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IN THE

Supreme Court of the United States

No. 73-1736

LEON WEISS, ETHEL WEISS,
MELCO INTERNATIONAL, LTD., and
MELCO INTERNATIONAL, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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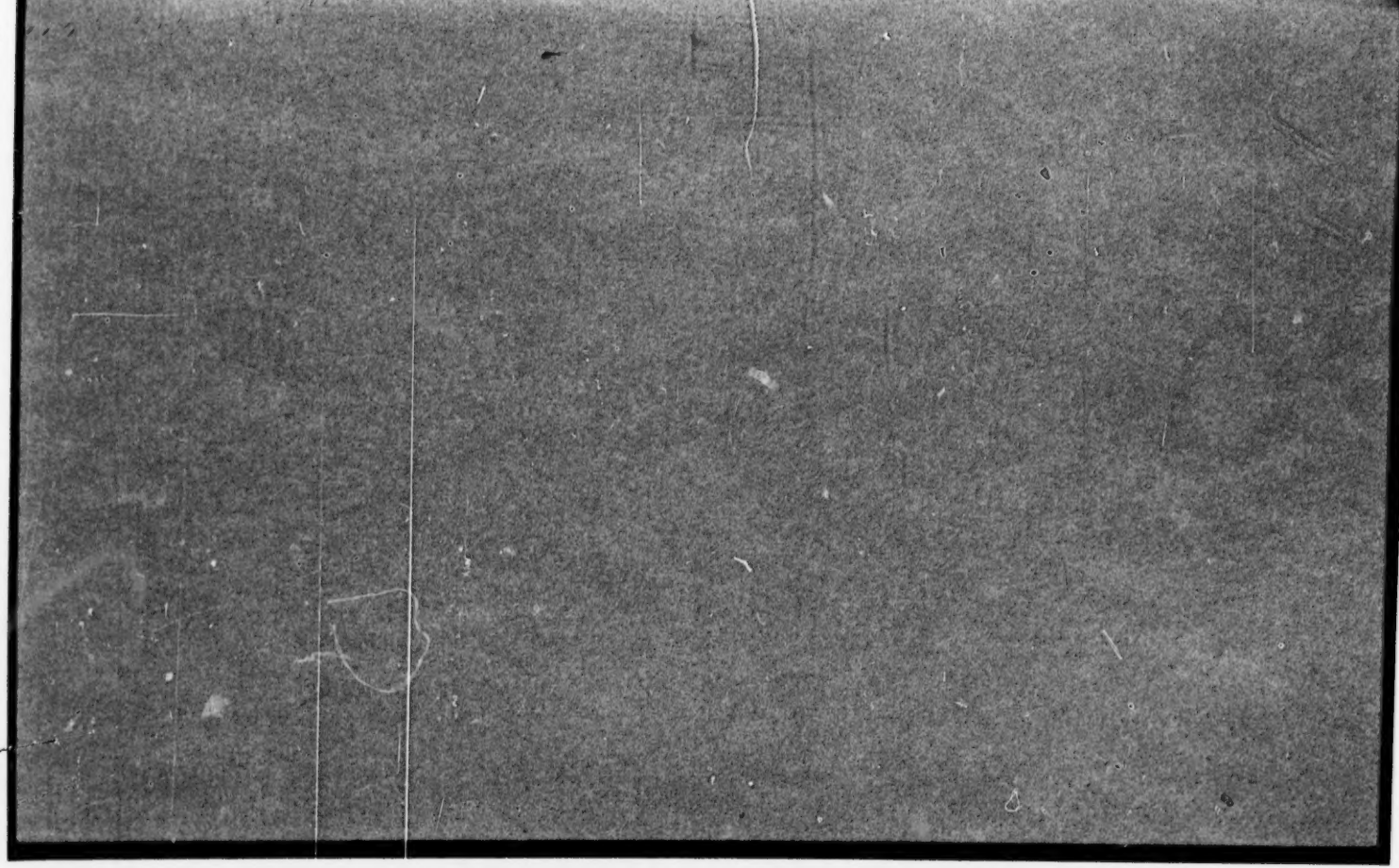

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, LEON WEISS, ETHEL WEISS, MELCO INTERNATIONAL, LTD., and MELCO INTERNATIONAL, INC., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 15, 1974, in order to resolve conflicts with decisions of this Court and of other federal appellate courts on recurring constitutional questions and to rectify the trial judge's serious departure from

acknowledged standards of judicial conduct necessary for a fair trial.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reprinted in Appendix A to this Petition, is reported at 491 F.2d 460 (2d Cir. 1974).

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 15, 1974, and is reprinted in Appendix B to this Petition. Timely petitions for rehearing and suggestions for rehearing in banc were denied on March 20, 1974. Copies of the orders denying rehearing are reprinted in Appendix C, and copies of the orders denying rehearing in banc are reprinted in Appendix D. A timely application for an extension of time to and including May 20, 1974, within which to file this Petition was made on April 5, 1974, and granted by Mr. Justice Marshall on April 9, 1974. A copy of Mr. Justice Marshall's order is reprinted in Appendix E. This court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 22(2) of this Court's rules.

QUESTIONS PRESENTED

As to All Petitioners

1. Despite the appellate court's findings that "[m]any of the trial judge's comments, characterizations, and castigations of [the Weiss defendants'] counsel . . . raised serious doubts as to the court's impartiality and judicial detachment" (App. A, at 15a), that the trial judge's appointment of unqualified counsel to represent the related corporate defendants was coerced, and that "his excoriation . . ., displays of temper and threats of contempt . . . [of cor-

porate counsel] was wholly unjustified" (*id.* at 17a), the court held that the defendants had not been deprived of a fair trial. The question is therefore whether the court of appeals erred in not holding that the trial judge, by virtue of his repeated rebukes, threats of contempt, and disparaging remarks directed at defense counsel and their conduct of the defense, as well as his excessive interference in the examination of witnesses, failed in his duty to maintain the rule of civility in the courtroom and displayed an attitude of partisanship which resulted in the denial to defendants of a fair trial and of due process of law.

As to Petitioners Leon and Ethel Weiss

2. Whether evaluation of the sufficiency of charges in an indictment must include a review of whether the charges are stated with sufficient precision to provide assurance that the accused will be tried on charges of conduct deliberated upon by the Grand Jury.

As to Petitioner Ethel Weiss

3. Whether it was error to have required petitioner Ethel Weiss to stand trial on the single count of obstruction of justice jointly with co-defendants who were tried on 18 separate counts for crimes allegedly committed in the course of a scheme to defraud to which petitioner admittedly had not been a party.

As to Petitioners Melco International, Ltd., and Melco International, Inc.

4. Whether the lower court's holding -- that, regardless of the ineffective assistance of the admittedly unqualified appointed counsel for corporate defendants, those defendants were not prejudiced because their interests were so identical with those of their principal, petitioner Leon

Weiss, that any and all steps that would have been taken by the corporations' own counsel, if he had been competent, were in fact taken by the principal's counsel – violated the corporations' constitutional right to the assistance of counsel.

5. Whether the appellate court erred in holding that, even though, as the government had conceded, there was nothing in the record to show that the trial judge had *in personam* jurisdiction over the foreign corporate defendants at the time of the filing of the indictment, and even though the government had the burden to establish such jurisdictional facts, nevertheless, the corporate defendants would be subjected to another hearing on remand for the purpose of again determining the jurisdictional question.

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense."

18 U.S.C. §1503 provides in pertinent part as follows:

> "Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Rule 8(b) of the Federal Rules of Criminal Procedure provides as follows:

> "**Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

STATEMENT OF THE CASE

By indictment filed February 3, 1973 (1 J.A. 7-19),[1] petitioners Leon Weiss, Melco International, Ltd., and Melco International, Inc., were charged in 18 counts with conspiracy (18 U.S.C. §371), mail fraud (18 U.S.C. §1341),

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[1] "J.A." refers to the Joint Appendix, which was filed in the court of appeals. It is composed of three volumes. The "J.A." designation will be preceded by either 1, 2, or 3 to indicate volume number and will be followed by the appropriate page number. A copy of the Joint Appendix has been filed with the Clerk of this Court.

and making false statements (18 U.S.C. §1001). All 18 offenses were alleged to have arisen out of the termination of a concession contract between Melco International, Ltd., and the Vietnam Regional Exchange, part of the Army and Air Force Exchange Service, and encompassed a single alleged scheme to defraud. At the time of the alleged scheme, Leon Weiss was the President and sole stockholder of Melco International, Inc., a Liberian corporation with its principal office in Switzerland, and Melco International, Ltd., a Hong Kong corporation, was the wholly owned subsidiary of Melco International, Inc.

Count 19 of the indictment charged petitioners Leon Weiss and his wife, Ethel Weiss, with obstructing the due administration of justice, in violation of 18 U.S.C. §1503 in that, from on or about March 5, 1971, up to the filing of the indictment, they "unlawfully, wilfully and knowingly did corruptly endeavor to obstruct, influence and impede the due administration of justice *by failing to produce documents* then in existence and under their custody and control . . .," that had been subpoenaed by the Grand Jury (1 J.A. 18-19) (emphasis added).[2]

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[2] Following a nine-day trial before the Honorable Lloyd F. MacMahon and a jury, petitioners were found guilty as charged – Leon Weiss on all 19 counts, the corporate petitioners on Counts 1 through 18, and petitioner Ethel Weiss on Count 19. Leon Weiss was sentenced to concurrent terms of imprisonment of 18 months on all counts and to the maximum possible fines on all counts for a total of $176,000.00. Ethel Weiss was sentenced to a fine of $5,000.00 and placed on probation for one year in lieu of one year of imprisonment, which was suspended. Each corporation was fined $11,000.00. Thereafter, Leon Weiss was released upon the payment of $75,000.00 cash bail.

1. The Trial Judge's Conduct of the Trial

The Trial Judge's conflict with defense counsel and his hostility towards the principal defendant commenced with the defense's challenge to the court's *in personam* jurisdiction over the two foreign corporations (*see* Statement of the Case, Part 4). This jurisdictional challenge – which the court of appeals upheld (App. A, at 19a) – in the trial court's view, was only a game (1 J.A. 25):

> "We aren't playing games. If Mr. Weiss wants to play games, he's got the wrong guy to play with. Let him play all the games he wants. I know about playing games, too. Kostelanetz [Weiss' counsel] and his games."

The Court's hostility became increasingly evident (i) in the court's assertion of jurisdiction over the corporations (1 J.A. 103), despite the lack of record evidence to justify the ruling (as conceded below, *see* App. A, at 19a; Statement of the Case, Part 4); (ii) in the court's refusal to grant petitioner Ethel Weiss' motion for severance (*see* 1 J.A. 21-24), in violation of Rule 8(b), Fed. R. Crim. P. (as assumed by the court below, *see* App. A, at 12a-13a; Statement of the Case, Part 3); (iii) in the court's appointment (1 J.A. 3) of incompetent counsel to represent the two corporations (as found by the court below, *see* App. A, at 16a-17a; Statement of the Case, Part 1(a)); (iv) in the judge's threats to hold counsel for all four petitioners in contempt (undisputed facts of record, *see* 2 J.A. 1-4, 14-15, 133-34; 3 J.A. 208-09); (v) in his order (later vacated) holding counsel for Ethel Weiss in contempt (undisputed fact of record, *see* 3 J.A. 212); and (vi) in the well over 100 instances in which the court entered into threatening colloquys with and rebukes to defense counsel, interfered with the examination of witnesses and

otherwise excessively injected itself into the conduct of the trial; and directed disparaging comments and deprecatory remarks against defense counsel and their conduct of the defense (*see* Statement of the Case, Part 1(b)).

(a) *The Appointment of Unqualified Counsel for the Corporations and the Trial Judge's Threats.* A major precipitating event of the conflict between the trial judge and defense counsel was the court's appointment of William S. Hack to represent the two Melco corporations (1 J.A. 3). Following his appointment as counsel, Mr. Hack advised the court before trial, by letter (1 J.A. 104), that he had never participated in a criminal trial in his career, had participated only once, fifteen years earlier, in a civil suit (landlord-tenant), and therefore did not have the "competence, experience or time to defend any defendant in a criminal matter." The court refused to relieve him. Under threat of being held in contempt, Hack attended the trial (*see* 2 J.A. 1-4). He insisted, however, that he could not participate actively (2 J.A. 2-3):

> "I feel that if I am forced to represent defendants in this case, it is worse than if such defendants had no attorney at all, because as a member of the bar I give the appearance of representing these defendants but because of my total incompetence in criminal matters, they will in fact have no representation. If I am forced to represent these defendants, the best thing I can do is remain completely silent except to note for the record my total incompetence."

The trial judge rejected this position, and maintained that, since Hack was a member of the Bar, he was "presumptively

competent to represent" the corporate defendants at trial (3 J.A. 232):

> "You represent that you are competent to handle cases implicitly when you become a member of the Bar of this Court. We don't draw deeds, we don't write the corporate indentures, we litigate and there is no other reason for becoming a member of the Bar of the Federal District Court."

The court's intimidation of Mr. Hack did not cease with the threat of contempt. After Mr. Hack waived his opening statement, the judge administered additional admonitions to him out of the presence of the jury (2 J.A. 14).[3]

In the middle of the trial, Mr. Hack made a further application to be relieved (2 J.A. 136-37). When his application was denied, he asked that Mr. Charles Lee, a former Assistant United States Attorney, serve as "of counsel" or in Hack's employ. The court refused, suggested that he "get to work and quit crying about it" (2 J.A. 137), and threatened to report him to the Bar Association (2 J.A. 138).

Mr. Hack made no objections to any questions posed to witnesses, nor to their responses, and he made no objections to any introduction of evidence during the entire nine-day trial. He cross-examined no witnesses of the government, asked no questions of witnesses for the defense, and called no witnesses on behalf of his clients. Mr. Hack remained mute throughout most of the trial,

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[3] The record of this conversation was sealed (2 J.A. 15), and Hack was refused a copy of the record (2 J.A. 62-63).

except that, under intimidation by the judge, he perfunctorily moved for acquittal after presentation of the government's case,[4] for dismissal after presentation of the defendants' case,[5] and for judgment notwithstanding the verdict after the jury found the defendants guilty. All three motions were summarily denied. Mr. Hack also made a brief summation but it was substantially in behalf of the Weiss defendants rather than his own corporate clients (*see* J.A. 324-26).

The court's recriminations, displays of temper, and threats against Mr. Hack also carried over to Mr. Jules Ritholz,

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[4] "MR. HACK: Your Honor, I feel that I am not able to make motions and that I have pointed out to the Court earlier in two regards my inability to make the motions, not only as to my incompetence, but also –

"THE COURT: Mr. Hack, do you want me to write an opinion on your incompetence? I would be happy to do it if it would make you happy.

"MR. HACK: No. . . .

"THE COURT: Mr. Hack, . . . at the moment I direct you to move for a judgment of acquittal in behalf of your clients.

"MR. HACK: Your Honor, in respect to your suggestion, at the order of the Court, I will move for an acquittal. . . .

"THE COURT: And I will deny it." (3 J.A. 229-30)

[5] "MR. HACK: Can I ask for guidance?

"THE COURT: Come off it. Can you read, Mr. Hack?

"MR. HACK: Yes, I can read, your Honor.

"THE COURT: You can read the federal rules in about a half an hour.

(Cont'd)

counsel for Leon Weiss,[6] and to Mr. Joseph E. Brill, counsel for Ethel Weiss.[7]

(Footnote 5 Cont'd)

"MR. HACK: I move to dismiss.

"THE COURT: Denied. What kind of ploy do you think you are pulling?" (3 J.A. 318)

[6] "MR. RITHOLZ: Objection, your Honor. We are referring to a duplicate set. Can we have the exhibit numbers for these two sets?

"MR. BEN-VENISTE [Government Counsel]: We don't have the duplicate set, Mr. Ritholz, you know that.

"THE COURT: Mr. Ritholz, sit down and quit interrupting.

"MR. RITHOLZ: He's talking about a set of invoices, your Honor.

"THE COURT: I heard the questions. Sit down. Proceed.

"MR. BRILL: I have an objection to the comment made by the prosecution and I move on the basis of his comment that your Honor instruct the jury to disregard it. He made a comment about what Mr. Ritholz knows.

"THE COURT: I think it was a fair answer to an unwarranted interjection.

"MR. RITHOLZ: I object to that, your Honor.

"THE COURT: Sit down.

"MR. RITHOLZ: It is not necessary to shout at me, your Honor.

"THE COURT: I am not shouting at you. Sit down." (2 J.A. 132-33; *see* 2 J.A. 133-34)

[7] "THE COURT: . . . I don't want any more of your lip.

"MR. BRILL: I'm not giving you any lip and I don't want to be shouted at.

"THE COURT: Stop it this instance.

(Cont'd)

(b) *The Trial Judge's Deprecatory Remarks Against Defense Counsel and His Interference in the Trial Proceedings.* The trial judge undermined the defense by making numerous disparaging comments and deprecatory remarks about defense counsel and their conduct of the defense. Over two-thirds of these remarks occurred in the jury's presence. The comments were directed against defense counsel's opening statements, their method of direct and cross-examination, their method of making proffers of evidence, their voicing of objections, and their presentation of legal arguments. The judge's comments mainly called into question defense counsel's sense of relevancy, their abilities as advocates, their competency, their intelligence and intelligibility, and, most seriously, their honesty and candor. A comprehensive analysis of these remarks and comments is set forth in Appendix F to this Petition. Typical of those comments were the following –

(i) in the presence of the jury:

> – "I understand English, Mr. Ritholz. I understand it very clearly. Overruled, if that is an objection, which it isn't." (2 J.A. 53)
>
> * * * *
>
> – "I don't know what you are driving at. I don't think a clairvoyant can tell." (2 J.A. 105)

* * * *

(Footnote 7 Cont'd)

> "MR. BRILL: I will, but don't shout at me and don't threaten me and don't intimidate me.
>
> "THE COURT: You are making statements for the record, that's all you are doing.
>
> "MR. BRILL: I am not. I am only interested in being treated as a lawyer and an officer of this court and a human being." (3 J.A. 208; *see* 3 J.A. 211-12)

– "Oh baloney. . . . you have got some wierd ideas if I ever saw them. . . . It has no apparent relevancy." (2 J.A. 107)

* * * *

"THE COURT: Voice your objections in terms of the rules of evidence, Mr. Rittenholz.

"MR. RITHOLZ: My name is Ritholz, sir.

"THE COURT: All right, whatever it is." (2 J.A. 131)

* * * *

– "Well, maybe you can do it [elicit evidence as to the 'pipeline problem' of obtaining silk goods] without going back to the silkworm." (2 J.A. 160)

* * * *

– "The witness can answer if he can understand it. I don't. Maybe he can." (2 J.A. 162)

(ii) in the jury's absence:

– "I can't help you, Mr. Ritholz. I can't help you. If you think that, I can't help you. It is hopeless." (3 J.A. 286)

* * * *

"THE COURT: . . . You have no sense of what is relevant at all.

"MR. RITHOLZ: Before the jury comes in, your Honor, I have other things. We might as well get it cleared up.

"THE COURT: I can't clear it up. I'd have to go back to grammar school.

"MR. RITHOLZ: Do you want me to hold them, your Honor?

"THE COURT: Proceed. I didn't retain you. Do your job the best you can." (3 J.A. 287-88)

* * * *

– "I have to stay down here night and day with this nonsense that you have given me." (3 J.A. 305)

* * * *

– "[Following argument on a motion to dismiss Counts 2-17:] That is the most specious argument I have ever heard." (3 J.A. 220) "[Following further argument:] That is the second most specious argument I have ever heard." (3 J.A. 221)

The trial judge further displayed an attitude of partisanship by excessively injecting himself into the trial proceedings. He followed a pattern and method of sustaining prosecution objections even before they were voiced;[8] of overriding defense objections to questionable evidence;[9] of unequal treatment of prosecution and defense witnesses;[10]

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[8] *See, e.g.*, 2 J.A. 72, 77-78, 84-85, 109-11, 149; 3 J.A. 260, 267, 272, 273, 299.

[9] *See, e.g.*, 2 J.A. 30, 31, 43, 52; 3 J.A. 306-07.

[10] *See, e.g.*, 2 J.A. 32, 173; 3 J.A. 194, 211, 307-08, 311-14.

of unfairness in giving time breaks;[11] of restrictions on cross-examination;[12] of unfair discretionary rulings;[13] and of interference in the examination of witnesses.[14]

(c) *The Findings of the Court of Appeals.* The appeals court agreed that the trial judge had directed against counsel for the Weiss defendants and the conduct of their defense "[a] rather impressive array of rebukes, threats and harsh statements" (App. A, at 14a), which were "unfortunate," which indicated "a possible attitude of partisanship," and which raised "a substantial issue as to the trial judge's fairness in conducting the trial" (*id.* at 15a).

As the court elaborated (*id.*):

> "Many of the trial judge's comments, characterizations, and castigations would have been better left unexpressed, since they not only failed to serve any useful purpose but raised serious doubts as to the [trial] court's impartiality and judicial detachment."

The court also found that, not only had the trial judge coerced counsel (Mr. Hack), who was not qualified to represent the corporate defendants, but also, in response to the appointed counsel's protestations of lack of competence, the judge had proceeded to excoriate, threaten and intimidate him (*id.* at 17a) (emphasis added):

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[11] *See, e.g.*, 3 J.A. 200-01, 293, 302, 319-20.

[12] *See, e.g.*, 2 J.A. 128-29; 3 J.A. 189.

[13] *See, e.g.*, 2 J.A. 166; 3 J.A. 213-15, 233-35, 257, 264-65, 268, 281-84, 296-98.

[14] *See, e.g.*, 2 J.A. 18-19, 32, 33, 36, 41, 50, 80, 146-48, 164, 187-88; 3 J.A. 185-86, 196-98, 198-99, 216, 247-48, 270.

> "Notwithstanding Hack's lack of qualifications to represent the corporate defendants at trial the judge, refusing to listen to or to accept Hack's protestations of incompetency, ordered him to represent them at trial, threatening in an open courtroom clash before trial to hold Hack in contempt and to report him to the Association of the Bar if he did not do so. . . .
>
> "*The conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified.*"[15]

Despite its strong denunciations of the trial judge, the court held that the judge's conduct had not amounted to denial of a fair trial. Further, the corporate defendants were held not to have suffered prejudice through the coerced appointment of unqualified counsel to represent them because the identity of interests between the corporations and the principal defendant, Leon Weiss, was such that "[a]ny and all steps that would have been taken on their behalf by their own counsel were taken by Weiss' attorney with the same force and effect" (*id.* at 18a).

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[15] With respect to Mr. Hack's lack of qualifications, the court further stated (App. A, at 17a):

> "Admission to the District Court bar of a lawyer who has never before tried a criminal case does not ipso facto qualify him to act as defense counsel in a complicated conspiracy trial. The proper procedure, if the corporate defendants persisted in refusing to appear by retained counsel, was to appoint a lawyer qualified to serve. . . ."

2. The Sufficiency of the Obstruction of Justice Count

At the outset of the trial, at the conclusion of the government's case, as well as at the end of the case, petitioners Leon and Ethel Weiss moved to dismiss Count 19 on the ground that the charge of a naked failure to produce subpoenaed documents did not constitute a crime under 18 U.S.C. §1503 and that, since Count 19 contained no other allegation of conduct, there was no affirmative conduct charged which could constitute an obstruction of justice (2 J.A. 5-6, 63-67; 3 J.A. 222-28, 317, 321).

Although the trial judge denied the motion on all occasions, he charged the jury that, as a necessary element of the crime of obstruction of justice, it must find that –

> "[t]he defendant by his or her actions deliberately endeavored corruptly to obstruct, impede or frustrate the due administration of justice by removing, destroying, suppressing, concealing, tampering with or otherwise impairing the availability of subpoenaed records and documents" (3 J.A. 335).
>
> "[T]he defendant must have engaged in some conduct, taken some step, or committed some act, such as altering, destroying, mutilating, suppressing, concealing, tampering with, removing or impairing the availability of documents or records which contained information material to the grand jury's investigation" (3 J.A. 336).
>
> "I want to caution you that the mere disobedience of a subpoena, the mere or naked failure to produce subpoenaed documents, does not

> constitute the crime of obstruction of justice alleged in count 19. Before you can find such an obstruction of justice, proof of the third element requires the proof of some act of the type I have outlined: destroying, altering, suppressing, concealing" (3 J.A. 337).

The judge thus permitted the jury to convict on the basis of *any* conduct whatsoever in the record which allegedly resulted in the petitioners' "failing to produce" the documents, even though there was no such conduct charged in the indictment.

Although the appeals court agreed that affirmative conduct was required for a violation of the act, it approved the trial judge's submission of Count 19 to the jury. The court reviewed petitioners' attack on Count 19 solely to determine whether the count sufficiently informed the accused of the charge for purposes of trial preparation and double jeopardy, concluding that the use of statutory generic language in the count, together with the potential availability of a bill of particulars and a trial continuance, had sufficiently apprised the defendants "of the charge to enable them to prepare and defend with respect to it" (App. A, at 11a). In doing so, the court completely ignored the separate and distinct point upon which Count 19 had been challenged: that, on its face, the count did not charge the offense in such a way as to provide assurance, in accordance with the basic protection of the Fifth Amendment, that the defendants would be brought to trial on charges of alleged illegal conduct that had been actually deliberated upon by the Grand Jury.

3. The Improper Joinder of Defendants

The charges in the first 18 counts of the indictment were asserted solely against Leon Weiss and the two corporate petitioners. None of these charges had been filed against petitioner Ethel Weiss, nor did any of the charges in Counts 1 through 18 refer to her in any way.

At trial, the prosecution did not offer any evidence linking Ethel Weiss to the scheme to defraud alleged in the first 18 counts; nor did it offer evidence to show that she even had knowledge of the scheme while it was being committed. Indeed, the government conceded that the conspiracy to defraud did not encompass the obstruction of justice as one of its objects (3 J.A. 300) and made the point at trial that evidence of the 18 separate crimes was not being offered against Ethel Weiss (*see, e.g.*, 2 J.A. 108). Moreover, each government co-conspirator witness testified to the absence of contact with Mrs. Weiss (*see* 2 J.A. 108-09, 112-13, 175-77).

Only the last count of the 19-count indictment, relating to the obstruction of justice for failure to produce documents, named Mrs. Weiss, and that count alleged only that some two years after the completion of the scheme to defraud set forth in Counts 1 through 18, she assisted one of the alleged conspirators – her husband – in withholding invoices from a Grand Jury investigating the fraud.

Despite the timely pretrial motion for severance under Rule 8(b) of the Federal Rules of Criminal Procedure (*see* 1 J.A. 21-24), Mrs. Weiss was made to stand trial jointly with the other co-defendants.

On appeal, the court ruled that, even if the joinder violated Rule 8(b), Ethel Weiss had failed to show any prejudice to herself as a result of having been required to stand trial jointly while members of the conspiracy were tried for 18 separate crimes. In her petition for rehearing, Mrs. Weiss argued that the joinder of the 19 offenses, which from her standpoint were unrelated, violated Rule 8(b) and was thus prejudicial *per se*.

4. The Improper Assertion of *In Personam* Jurisdiction over the Corporate Defendants

Petitioner Leon Weiss was arraigned on February 6, 1973 – the day that the indictment was returned (1 J.A. 1); no appearances, however, were entered on behalf of the two corporate petitioners. At a pre-trial hearing, the government chose to rest its case on jurisdiction over the corporate defendants solely on a showing from the documents (1 J.A. 31-88) appended to its affidavit (1 J.A. 26-30) that "Leon Weiss had been an agent for the corporations from 1967 through 1969 and continued to be an agent in 1971" (App. G, n. *),[16] that, consequently, the summons had properly been served on Weiss as managing agent, and that the "defendant corporations were present in New York in connection with the activities upon which the instant indictment is founded" (1 J.A. 29). This, the government argued, was sufficient for criminal jurisdiction in 1973.

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[16] Appendix G is a reprint of page 27 of the Government's Brief on appeal in the Court below.

Although defense counsel noted that he did not think that "even a *prima facie* showing of presence in 1967 or 1969 has been made" (1 J.A. 97-98), nevertheless, for purposes of the government's motion, he chose to take issue only with the government's legal theory and to argue that only facts relating to the time of indictment and service of process were relevant. The government, however, had not offered proof to show that, as of the time of the indictment and service of process in February 1973, the defendant corporations were doing business in New York or that Leon Weiss was an officer, director or managing agent of those corporations (*see* 1 J.A. 89-90, 97-99).

With the issue thus joined, the government denied any "legal significance" to the two-year gap in its evidence between 1971 and 1973 (1 J.A. 100). Moreover, notwithstanding that the defense had specifically challenged the government on the two-year gap, the prosecutor stated: "We will rest, your Honor, on those papers unless your Honor has a specific question" (1 J.A. 101). The trial court, without further deliberation, found that the corporations were subject to the court's jurisdiction.

On appeal, the government conceded that it had failed to establish jurisdiction over the corporations (*see* App. G). The appeals court agreed, finding that "[t]he burden was upon the government to establish current jurisdictional facts" and that, from the record made by the government below in support of jurisdiction, the court could not "conclude that the corporations were subject to the [trial] court's jurisdiction at the time of filing of the indictment" (App. A, at 19a). Despite these findings, the Second Circuit held that the cause was to be remanded for a new jurisdictional hearing to determine whether the corporations

"were present within the jurisdiction at the time of the indictment and whether Weiss continued to be their managing agent at that time" (*id.*).

REASONS FOR GRANTING THE WRIT

As to All Petitioners

I. THE APPELLATE COURT'S FINDING THAT THE TRIAL JUDGE'S CONDUCT OF THE PROCEEDINGS DID NOT DEPRIVE DEFENDANTS OF A FAIR TRIAL CONFLICTS WITH THIS COURT'S DECISION IN *OFFUTT* AND THE SEVENTH CIRCUIT'S DECISION IN *DELLINGER* AND IS INCONSISTENT WITH ACCEPTED STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE.

The fundamental question presented by this petition is the federal trial judge's responsibility for maintaining the rule of civility in the courtroom. Much has been said and written concerning the Bar's responsibilities in this regard. But if the trial judge does not point the way, the atmosphere of the courtroom is irretrievably debased. As the Chief Justice stated in his remarks on *The Necessity for Civility* at the 1971 opening session of the American Law Institute (52 F.R.D. 211, 215, 216 (1971)):

> "[C]ivility is relevant to judges, and especially trial judges. . . . Every judge must remember that no matter what the provocation, the judicial response must be judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider.

* * * *

> "The essence of the matter is that if the rights of individuals or society as a whole are to be protected, it can be accomplished only in a judicial environment of calm, orderly civility."[17]

The lower court's holding that the trial judge's conduct of the trial, his castigations of defense counsel, and his disparaging comments directed against the defense did not amount to a denial to defendants of a fair trial and of due process of law is in conflict with this court's decision in *Offutt v. United States,* 348 U.S. 11 (1954), and the Seventh Circuit's decision in *United States v. Dellinger,* 472 F.2d 340 (1972), *cert. denied,* 410 U.S. 970 (1973).

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[17] The American Bar Association's Project on Standards for Criminal Justice has issued its own widely applauded and accepted *Standards Relating to the Function of the Trial Judge* (Approved Draft, 1972). Section 6.4 of the Standards states (at 19):

> "The trial judge should be the exemplar of dignity and impartiality. He should exercise restraint over his conduct and utterances. He should suppress his personal predilections, and control his temper and emotions. He should not permit any person in the courtroom to embroil him in conflict, and he should otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during the trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he should do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues."

In *Offutt*, this Court set down guidelines for determining whether judicial conduct has gone beyond the confines of a fair trial (emphasis added):

> "*Almost from the outset, a clash between the presiding judge and . . . [counsel] became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones.* The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment, for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor" (348 U.S. at 12).
>
> * * * *
>
> "The question with which we are concerned is not the reprehensibility of . . . [defense counsel's] conduct and the consequences which he should suffer. Our concern is with the fair administration of justice. The record discloses not a rare flare-up, not a show of evanescent irritation – a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with . . . [counsel]. There was an intermittently continuous wrangle on an unedifying

> level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. *His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury*" (*id.* at 17).

In the *Dellinger* case, the Seventh Circuit, *inter alia,* explored at length the significance of a trial judge's gratuitous comments disparaging defense counsel and the defense. As in *Offutt,* the court in *Dellinger* stated (emphasis added):

> "*The district judge's deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning.* It appears in remarks and actions both in the presence and absence of the jury" (472 F.2d at 386).
>
> * * * *
>
> "Most significant, however, were remarks in the presence of the jury, deprecatory of defense counsel and their case. These comments were often touched with sarcasm, implying rather than saying outright that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit. Sometimes the comment was not associated with any ruling in ordinary course; sometimes gratuitously added to an otherwise proper ruling; nearly always unnecessary. Taken individually any one was not very significant and might be disregarded

> as a harmless attempt at humor. But *cumulatively, they must have telegraphed to the jury the judge's contempt for the defense*" (*id.* at 387).

The strong parallel between the incidents in the present case and those in the *Offutt* and *Dellinger* cases cannot be gainsaid. The trial judge's constant excoriation, threats, and intimidation of the corporate defendants' coerced and unqualified appointed counsel and the judge's further comments, characterizations, and castigations of the Weiss defendants' counsel, when viewed together as an organic whole, indicates clearly the conflict of the lower court's decision with those in the *Offutt* and *Dellinger* cases.

In the present case, the lower court found that the trial judge's appointment of unqualified counsel to represent the corporate defendants was coerced, that "his excoriation . . ., displays of temper and threats of contempt, . . . [of corporate counsel] was wholly unjustified" (App. A, at 17a), and that "[m]any of the trial judge's comments, characterizations, and castigations of [the Weiss defendants'] counsel . . . raised serious doubts as to the court's impartiality and judicial detachment" (*id.* at 15a). It was able to ignore the cumulative force of these findings by artificially subdividing the trial, separately treating the incidents involving counsel for the Weiss defendants from those involving appointed counsel for the corporations, as if they had occurred in a vacuum rather than in the presence of other counsel and the jury.

The same identity of interests between the principal defendant, Leon Weiss, and the two Melco corporations the court relied on to explain the refusal to grant the corporate defendants a new trial[18] should have been invoked to

[18] *See* page 16, *supra.*

show that the Weiss defendants had been prejudiced and handicapped at trial. The trial judge had been informed prior to the trial that Mr. Hack had previously been counsel to Mr. Weiss and his companies (*see* 1 J.A. 94) and was fully aware at trial that, when he was attacking Mr. Hack, he was attacking an attorney identified with Mr. Weiss. Indeed, during the trial, the judge injected himself into the examination of an officer of one of Mr. Weiss' other companies to bring forcibly to the jury's attention Hack's identification with Weiss (*see* 3 J.A. 185-86). Thus, what the trial judge did to the corporations' appointed counsel, Hack, was a clear manifestation of his hostility to Weiss and had to have a spillover, prejudicial impact on the other counsel, on the Weiss defendants, and on the jury. So, too, the coerced appointment of unqualified counsel who interposed no defense for the corporations was bound to reflect adversely on the Weiss defendants. Had the appeals court treated the trial as an organic whole, these considerations would have compelled the conclusion that all defendants were denied a fair trial.

Not since *Offutt*, 20 years ago, has the Court taken the occasion to reaffirm and elaborate the high standards of conduct expected from the federal trial bench – standards which regrettably were not met here. The present case provides timely occasion for this Court, in the exercise of its supervisory authority over the lower federal courts, to elaborate on the proper standards governing the trial judge and his responsibility for maintaining civility in the courtroom.

As to Petitioners Leon and Ethel Weiss

II. IN FAILING TO DISMISS THE OBSTRUCTION OF JUSTICE COUNT ON THE GROUND THAT IT FAILED TO PROVIDE ASSURANCE THAT PETITIONERS HAD BEEN BROUGHT TO TRIAL ON CHARGES OF ALLEGED ILLEGAL CONDUCT DELIBERATED UPON BY THE GRAND JURY, THE APPEALS COURT PLACED ITSELF IN CONFLICT WITH THE PRINCIPLES OF DECISIONS OF THIS COURT, OF THE FIFTH CIRCUIT, AND OF ANOTHER PANEL OF THE SECOND CIRCUIT.

The court of appeals found that "mere failure to produce the documents" would not constitute the crime of obstruction of justice, and that "affirmative conduct . . ., such as destruction, concealment or removal of the documents" was required for conviction (App. A, at 11a). However, Count 19 contained *no* allegations of appellants' affirmative conduct, but only the admittedly inadequate charge of "failing to produce documents." Repetition of the omnibus statutory language in the count – that the defendants did "corruptly endeavor to obstruct, influence and impede" the due administration of justice – could not have served as a sufficient allegation of affirmative conduct, for those terms are generic, "all-embracive,"[19] and broad enough to "cover any act."[20] *See Russell v. United States*, 369 U.S. 749, 765 (1962).

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[19] *United States v. Cohn*, 452 F.2d 881, 883-84 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

[20] *Samples v. United States*, 121 F.2d 263, 266 (5th Cir.), *cert. denied*, 314 U.S. 662 (1941).

Because of the failure of the Count 19 to set forth specific affirmative conduct of petitioners constituting the obstruction of justice offense, the language of the count raised a serious question whether petitioners were actually placed on trial on the basis of charges of conduct deliberated upon and sifted by the Grand Jury. This deficiency obviously could not be remedied by the prosecution's supplying a bill of particulars.

In upholding the obstruction of justice count, without considering this question, the court of appeals placed itself in conflict with the principle of this court's decision in *Russell v. United States*, 369 U.S. 749 (1962); *cf. Stirone v. United States*, 361 U.S. 212, 215-16 (1960). The Second Circuit's ruling similarly conflicts with that of the Fifth Circuit in *Van Liew v. United States*, 321 F.2d 664, 669 (1963), and with the decision of another panel of the Second Circuit in *United States v. Silverman*, 430 F.2d 106 (1970), *cert. denied*, 402 U.S. 953 (1971).

In *Russell*, the court held (369 U.S. at 770-71):

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 243.

> ". . . '[I]f it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' *Ex parte Bain*, . . . [121 U.S. 1,] 10, 13. We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by the grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' *Stirone v. United States*, . . . [361 U.S. 212,] 218."

The *Russell* view was followed by another panel of the Second Circuit in the *Silverman* case. In *Silverman*, the court found that merely "tracking the language of the statute" in drafting the indictment was insufficient (430 F.2d at 109). Rather, as the court held (*id.* at 111):

> "Even though the indictment is drafted to charge the essential elements, the question remains whether on its face it presents evidence which assures us that such essential elements were presented to the jury and deliberated upon by them in returning the indictment."

This is precisely the inquiry that the court in the present case failed to make.

Also following the *Russell* rationale, the Fifth Circuit in the *Van Liew* case reversed convictions even though

the indictment had been drafted, tracking the language of the statute. As the court held (321 F.2d at 669):

> "Important as are the two most emphasized criteria – (1) notice and (2) double jeopardy – the presentment by a Grand Jury has in our constitutional scheme another basic function. It is the protection to the citizen against unfounded charges. Little may be left open to construction or interpretation of an indictment. If the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense."[21]

Count 19 was subject to the exact vice which the doctrines of *Russell, Van Liew,* and *Silverman* seek to prevent: the inability to determine from the indictment itself the basis upon which the Grand Jury founded its charges. If that requirement is not enforced strictly, and if indictments which merely repeat the omnibus language of the statute are held sufficient, then, in order to establish a basis for

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[21] The court in *Van Liew* also stated (*id.* at 672):

> "To the extent that the queries can be answered by response to a Bill of Particulars, the Defendant may not in fact have been deprived of the right to know what proof they would have to meet. But this is only part of it. For the District Attorney is not the Grand Jury, and he may not determine what it is that the Grand Jury charged. If the choice of one or more out of many unidentified crimes may be made by the prosecutor, then presentment by a Grand Jury will have become a useless, historic ritual."

conviction, the prosecution will be free to roam at large within limits defined only by generic language in the indictment – limits so broad that here they could "cover any act." The protection of the Grand Jury is thus withdrawn and the accused left to the mercy of unfettered prosecutorial discretion. The Fifth Circuit painstakingly analyzed the indictment in *Van Liew*, as did one panel of the Second Circuit in *Silverman*, to vindicate the principle expounded in *Russell*. The decision below ignores that principle and affords no recognition to the great constitutional function of the Grand Jury. Certiorari should therefore be granted to resolve this conflict.

As to Petitioner Ethel Weiss

III. IN FAILING TO HOLD THAT IT WAS PREJUDICIAL *PER SE* TO REQUIRE PETITIONER ETHEL WEISS TO STAND TRIAL ON COUNT 19 JOINTLY WITH OTHER DEFENDANTS CHARGED WITH THE COMMISSION OF 18 SEPARATE CRIMES TO WHICH SHE ADMITTEDLY WAS NOT PARTY, THE APPEALS COURT HAS PERPETUATED CONFUSION AMONG THE CIRCUITS AS TO THE PROPER IMPLEMENTATION OF RULE 8(b), FED. R. CRIM. P.

The court below ruled that, even assuming petitioner Ethel Weiss had been improperly joined under Rule 8(b), Fed. R. Crim. P., with the other defendants – who from her standpoint were being tried on unrelated offenses – she had the burden of proving prejudice to herself (*see* App. A, at 13a). The court's failure to find the misjoinder prejudicial *per se* pits the decision of the court below, which is supported by language in another opinion of the Second Circuit in *United States v. Granello*, 365 F.2d 990 (1966), *cert. denied*, 386 U.S. 1019 (1967),

and by language of the Ninth Circuit in *United States v. Roselli*, 432 F.2d 879 (1970), *cert. denied*, 401 U.S. 924 (1971), against the contrary decisions of the Fourth Circuit in *Ingram v. United States*, 272 F.2d 567, 569 (1959) ("[W]here multiple defendants are charged with offenses no way connected, and tried together they are prejudiced by that very fact."), of the Seventh Circuit in *United States v. Spector*, 326 F.2d 345 (1963), and of the D.C. Circuit in *Cupo v. United States*, 359 F.2d 990, 993 (1966), *cert. denied*, 385 U.S. 1012 (1967) ("Because of this misjoinder [under Rule 8(b)] we must reverse Carbenero's conviction, even if no special prejudice appears.").

In each of the latter three cases, a misjoinder under Rule 8(b) was found, and reversal of the conviction was ordered, with no requirement that special prejudice be shown. As the court stated in *Ingram* (272 F.2d at 570-71):

> "Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. The error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against one supported the charge against the other.

> It is not *'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials.'*"

Thus, as Moore summarizes the *Ingram* holding:

> "Any form of joinder not permitted by the terms of . . . Rule [8(b)] is conclusively presumed prejudicial." 8 Moore, *Federal Practice* §8.02[1], at 8-4 (Cipes ed. 1973); *see id.* at 8-14.

The decision below ignores the impropriety of the joinder under Rule 8(b) and simply searches the record of a mass trial for "prejudice" – a highly unrealistic enterprise since the "prejudice" which may come from the massing of evidence against other defendants, the demeanor and attitude of witnesses, or the trial tactics of co-defendants' counsel may be dehors the record.[22] The Second Circuit rule

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[22] For example, the "prejudice" approach led the Second Circuit to hold that detailed proof of the 18 separate crimes allegedly engaged in by Leon Weiss and numerous other persons, involving details of the filing of false affidavits and false claims, of the presentation of false statements, of the use of Swiss banks and letters of credit, and of the impeachment of various witnesses testifying with respect to the alleged conspiracy – in short, that all proof adduced by all sides at a nine-day conspiracy trial – would have been admitted against Ethel Weiss at a separate trial on a single charge of assisting her husband – two years after the conspiracy was over – in withholding subpoenaed documents. The Court's theory was that such evidence bore on the issue of Mrs. Weiss' motive to help her husband. With all deference, even if the necessary foundation had been laid, which it was not, it strains credulity to anticipate that any trial judge would have thus opened the door to distraction and delay at a separate trial. *Cf.* Rule 403, *Proposed Rules of Evidence for United States Courts and Magistrates*, 51 F.R.D. 315, 345 (1971).

would drain Rule 8(b) of much of its force and encourage prosecutors to seek broader and broader joinder discretion for mass trials. Thus, the present case serves as an excellent vehicle for this Court to clarify the confusion in the circuits and to make a definitive ruling on whether a joinder of defendants in violation of Rule 8(b) is prejudicial *per se*, or whether the prosecution and the trial court may overlook the strict limitation of criminal joinder on the theory that the appellate courts will correct the error if it has "prejudicially" affected a conviction.

As to Petitioners Melco International, Ltd., and Melco International, Inc.

IV. THE COURT'S REFUSAL TO HOLD THAT THE CORPORATE DEFENDANTS HAD BEEN DENIED THEIR CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL, IN SPITE OF ITS FINDING THAT THE CORPORATIONS' APPOINTED COUNSEL WAS UNQUALIFIED AND INCOMPETENT AND DID NOT RENDER EFFECTIVE ASSISTANCE, CONFLICTS WITH LONG-STANDING DECISIONAL LAW OF THIS COURT.

Ever since the landmark case of *Powell v. Alabama*, 287 U.S. 45, 53, 71 (1932), it has been the law that the Sixth Amendment right to the assistance of counsel means the right to the effective assistance of competent counsel. *Accord, e.g., Avery v. Alabama*, 308 U.S. 444, 446 (1940); *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

In the present case, the coerced appointed counsel for the corporate defendants made no opening statement; did not cross-examine government witnesses; did not put on any witnesses or raise any defense whatsoever; did not object to any questions or to the introduction of incompetent

evidence or to any improper comments by judge or prosecutor; and did not make any adequate closing argument.

Even though the appellate court found that counsel was coerced, unqualified, and incompetent, and so could not have rendered effective assistance (App. A, at 17a), the court held that the corporations suffered no "prejudice requiring a new trial" because their interests were so identical with the interests of their principal, Leon Weiss, that any and all steps that would have been taken by the corporations' own counsel, if he had been competent, were in fact taken by Weiss' counsel "with the same force and effect" (*id.* at 18a).

It is indisputable that neither Mr. Weiss nor his counsel nor the trial judge nor the jury was aware of the supposed *de facto* representation of the corporations by Weiss' counsel. Not a word spoken by Weiss' attorney was said or understood to be in behalf of the corporate defendants. Quite the contrary, it was clear to the jury that Mr. Hack – and no one else – represented the corporations. As Hack said in an initial statement to the jury (2. J.A. 13-14): "[L]adies and gentlemen of the jury: As a member of the bar *I have been appointed* by his Honor *as counsel for the corporate defendants* in this matter" (emphasis added).

In light of Mr. Hack's ensuing silence, the jury could only have understood that the corporations were not defending against the charges. Whatever actions were therefore taken by Weiss' counsel could hardly have been equivalent to the service of a qualified defense counsel had he been appointed to represent the corporations.

The lower court's holding that the corporations' interests were represented, albeit unknowingly, by Weiss' attorney

conflicts with a fundamental principle established by this Court in *Powell v. Alabama*, 287 U.S. 45 (1932), and *Avery v. Alabama*, 308 U.S. 444 (1940), that the constitutional right to the assistance of counsel means the right to have, in the words of *Powell*, "an effective *appointment* of counsel" (287 U.S. at 71) (emphasis added), and in the words of *Avery*, the "due *appointment* of competent counsel" (308 U.S. at 446) (emphasis added). In other words, the right to the assistance of counsel means the right to have the appointment of one's own counsel. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). In the present case, it was Mr. Hack who was the appointed counsel for the corporations – not Mr. Ritholz, who was retained counsel for Mr. Weiss and who never purported to, or ever was advised that he bore the responsibility to, represent the corporate defendants at trial.

Although the panel found that there was an identity of interests between the corporations and Weiss, that identity had no juridical significance with respect to the question of representation by counsel at trial. Indeed, over thirty years ago this concept of identity of interest was laid to rest in another context by this Court in *Glasser v. United States*, 316 U.S. 60 (1942).

On the eve of trial in *Glasser*, the court appointed Glasser's retained counsel, Stewart, to represent Glasser's co-defendant, Kretske, as well. On appeal, and before the Supreme Court, Glasser complained that, because Stewart represented both defendants, Glasser's Sixth Amendment right to counsel had been violated. The Court upheld Glasser's contention and reversed the conviction. In so holding, the Court reasoned (315 U.S. at 75-76) (emphasis added):

> "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest *the additional burden of representing another party may conceivably impair counsel's effectiveness.*
>
> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*"

In contrast to *Glasser,* where counsel had at least been formally appointed to represent the co-defendant, here, Mr. Weiss' counsel *had not been appointed* as counsel for the corporations and was unaware – as was the jury – that he would be deemed by the court of appeals as representing the corporate defendants. Yet, the court, by its mere *ipse dixit* that the corporations had identical interests with those of Weiss, found "that the corporate defendants gained the full benefit of Weiss' defense" (App. A, at 18a), as if this were sufficient to obliterate the spectacle created at trial by the absence of any defense activity by the judicially coerced, unqualified appointed counsel, Mr. Hack. Accordingly, the gross deprivation of the corporate petitioners' right to the assistance of counsel in the present case warrants the grant of certiorari.

V. THE SECOND CIRCUIT'S DECISION TO REMAND THE CASE FOR A NEW JURISDICTIONAL HEARING AFTER FINDING THAT THE GOVERNMENT HAD FAILED TO ESTABLISH A BASIS FOR JURISDICTION OVER THE FOREIGN CORPORATIONS HAS CREATED A CONFLICT OF DECISION WITH THE NINTH CIRCUIT.

The court of appeals found that jurisdiction in a criminal case must be established as of the time of the filing of the indictment (App. A, at 19a; *cf. Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 334-35 (1925)), and that, although the government had the burden of proving the existence of the necessary jurisdictional facts (*see McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)), it failed to uphold its burden (App. A, at 19a). The court, nevertheless, held that the government was to be given a second opportunity to attempt to establish a basis for jurisdiction by remanding the case for a new jurisdictional hearing. By its ruling, the court created a conflict with the Ninth Circuit's decision in *Danziger v. United States*, 161 F.2d 299, *cert. denied*, 332 U.S. 769 (1947).

In *Danziger*, just as here, a principal individual defendant and two foreign corporate defendants had been indicted on various charges of fraud. In *Danziger*, the two foreign corporate defendants had been under the principal defendant's control during the time of the alleged fraud. Just as process for the Melco corporations had been sent to Weiss' office address by mail, so, in *Danziger*, process for the corporations had been left with the secretary at Danziger's office. In both cases, the corporate defendants were not represented by counsel at arraignment but subsequently had counsel appointed by the court. Just as the appointed counsel here protested about his appoint-

ment, so the appointed attorney in *Danziger* protested. Moreover, in circumstances similar to what occurred at the Weiss hearing on jurisdiction, the Ninth Circuit observed (161 F.2d at 301):

> "Service on Danziger's secretary was rather obviously insufficient since Danziger's connection with either corporation as of the time of service was denied in open court and no evidence was taken on the subject."

On these facts, the Ninth Circuit held that "[i]n the circumstances the court was without jurisdiction to proceed against them" (*id.*). The convictions of the corporations was thereupon reversed, and no further jurisdictional hearing was ordered. In contrast, the Second Circuit has permitted the conviction to stand and has remanded for a hearing on the issue of jurisdiction. Having had an opportunity to establish jurisdiction at a hearing and having failed to uphold its burden, the government now should not be given a second chance to rectify the errors which it itself had voluntarily committed pursuant to its own misguided tactics and strategy.

The Second Circuit's opinion has now created uncertainty and conflict as to the appropriate remedy on appeal for a criminal conviction admittedly based on a faulty finding of *in personam* corporate jurisdiction. This basic issue of criminal procedure relating to jurisdiction over corporations warrants authoritative resolution by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 532-535—September Term, 1973.

(Argued November 21, 1973 Decided January 15, 1974.)

Docket Nos. 73-1964-1967

UNITED STATES OF AMERICA,

Appellee,

—against—

LEON WEISS, ETHEL WEISS, MELCO INTERNATIONAL, LTD. and MELCO INTERNATIONAL, INC.,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, convicting Leon Weiss, Melco International, Inc., and Melco International, Ltd. of causing false invoices and documents to be submitted to the Army and Air Force Exchange Service of the Department of Defense, 18 U.S.C. §§1001 and 1031, mail fraud, 18 U.S.C. §1341, and conspiracy, 18 U.S.C. §371, and convicting Leon Weiss and Ethel Weiss of corruptly endeavoring to obstruct justice by failing to produce documents subpoenaed by the Grand Jury investigating the conspiracy, 18 U.S.C. §1503.

Affirmed as to Leon Weiss and Ethel Weiss.

Remanded as to the corporate defendants for further proceedings.

HOWARD A. HEFFRON, Esq., Washington, D.C. (Kostelanetz & Ritholz, New York, N.Y., Richard J. Medalie, Esq., of counsel), *for Appellants Leon Weiss and Ethel Weiss.*

RICHARD J. MEDALIE, Esq., Washington, D.C. (Epstein, Friedman, Duncan and Medalie, Washington, D.C., of counsel), *for Appellants Melco International, Ltd. and Melco International, Inc.*

ROBERT P. WALTON, Assistant United States Attorney (Paul J. Curran, United States Attorney, Southern District of New York, Kenneth R. Feinberg, John D. Gordan III, Assistant United States Attorneys, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Following a nine-day trial before Judge MacMahon appellants Leon Weiss, Melco International, Inc. and its wholly-owned subsidiary, Melco International, Ltd. (sometimes collectively referred to as "Melco") were on May 30, 1973, convicted of (1) conspiracy to violate 18 U.S.C. §§1001 and 1031 by causing false invoices and documents to be submitted to the Army and Air Force Exchange Service of the Department of Defense ("Exchange" herein) (Count 1), (2) causing invoices containing false statements to be submitted to an agency of the Exchange in violation of 18 U.S.C. §§1001 and 2 (Counts 2-17), and (3) mail fraud in furtherance of the scheme in violation

of 18 U.S.C. §1341 (renumbered Count 18). Appellants Weiss and his wife, Ethel Weiss, were also convicted of corruptly endeavoring to obstruct justice in violation of 18 U.S.C. §1503 by failing to produce documents subpoenaed by the Grand Jury investigating the scheme (renumbered Count 19).

Upon this appeal all defendants contend that the trial judge denied them a fair trial. Mr. Weiss and the two corporate defendants argue that certain evidentiary rulings were erroneous and require a new trial. The Weisses further urge that Count 19 (alleging a violation of 18 U.S.C. §1503) fails to state a crime. Mrs. Weiss adds the argument that she was improperly joined, and the corporate defendants assert that the district court's jurisdiction over them was not established. As to the last claim we remand the proceedings against the corporate defendants for a hearing to determine whether the court had jurisdiction over them. Finding no merit in the other contentions, we affirm.

The record, viewed in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), reveals a scheme engineered by Weiss to defraud the Exchange of thousands of dollars upon the termination of a concession agreement with the Vietnam Regional Exchange by inflating the actual costs incurred in connection with performance of the contract, thus falsely increasing the amounts to which companies controlled by Weiss would be entitled by way of settlement. Beginning in 1966 Weiss was the President and controlling stockholder of defendant Melco International, Inc., a Liberian corporation which represented manufacturers in the sale of goods to Army and Air Force Post Exchanges ("PXs" herein) in the Far East. Weiss maintained his principal office in New York for the furnishing of supplies to PXs operated by the Exchange in various parts of the world.

In March 1967 Herbert J. McElroy, salesman for Melco International, Ltd., a wholly-owned Hong Kong subsidiary of Melco International, Inc., with Weiss' approval entered into a contract for the sale of Thai-manufactured goods to Pxs in Vietnam. One month later, on April 18, 1967, the contract was terminated by the Exchange for reasons arising out of the adverse gold flow in the international balance of payments, which placed a strain upon the American dollar. Under the contract the termination entitled Melco to compensation for actual expenses and bona fide costs incurred in connection with its performance of the contract prior to its receipt of the termination letter.

Prior to the receipt of the notice of termination McElroy had on behalf of Melco obtained the agreement of three Thai suppliers (Longsan Limited, Thai Lapidary, and Thai Celanese) to furnish one month's supply of goods at a cost of approximately $43,000. At the same time, in order to gain a secret mark-up for Melco, McElroy had, with Weiss' approval, arranged with two of the Thai suppliers (Longsan and Thai Lapidary) that they would prepare double sets of invoices covering approximately $40,000 of the goods, one set showing the actual wholesale price to Melco and the other a higher wholesale price (increased by 10% on goods to be furnished by one supplier and 25% on goods from the other) for submission to the Exchange. Under this arrangement the two Thai suppliers, who were themselves realizing their profit on the lower invoiced price, would collect and "kick back" to Melco the difference between the two invoiced prices. In this way Melco would realize not only a mark-up amounting to the difference between the wholesale and retail prices disclosed to the Exchange but the secret "kick back" as well.

After receiving the notice of termination McElroy, again with Weiss' approval, secured the agreement of the Thai suppliers to a plan whereby they would cooperate with

Melco in enabling it falsely to represent to the Exchange that it, prior to the termination of the Exchange contract, had made irrevocable commitments to them to buy approximately $300,000 worth of Thai goods instead of the actual commitments of approximately $43,000. Accordingly a settlement proposal based on the false $300,000 commitment was submitted in June 1967 by Melco to the Exchange with Weiss' approval, supported by back-dated letters from the two collaborating Thai suppliers, falsified invoices, and fraudulent affidavits signed by McElroy.

Upon McElroy's being transferred by Weiss to Germany, John Moore, a Melco representative in Hong Kong, was assigned to conclude the settlement negotiations after being fully briefed by Weiss regarding the fraud and the hidden markup to be realized by Melco. Rather than risk delaying receipt of the kick back from the two suppliers until after they had received the inflated prices from the Exchange, Weiss arranged through a Swiss bank to pay each supplier the agreed-upon lower secret price (10% lower than the price on each invoice bearing the Exchange stamp in the case of Longsan and 25% lower in the case of Thai Lapidary) upon proof that the goods had been shipped to the Exchange at the inflated price. He then received from the suppliers releases falsely acknowledging that they had received the inflated amounts in payment when in fact they had been paid the lower true amounts. Melco was thus in a position directly to collect the inflated sums from the Exchange. As a result it realized approximately $42,000 to which it would not have been entitled if the truth had been revealed to the Exchange.

Mrs. Weiss became involved in the scheme after the Grand Jury began an investigation into Weiss' activities and a subpoena was on March 5, 1971, served on Weiss for production of invoices and records relating to the settle-

ment of the Vietnam PX contract. Thereupon Mrs. Weiss, after discussing the matter with her husband, made a secret trip from New York to Hong Kong where, aided by Leland Gage, Moore's successor at Melco's office there, she obtained the incriminating invoices showing the actual prices paid by Melco to the Thai suppliers. These documents were taken by her to Switzerland and, except for one such invoice from Thai Lapidary apparently furnished to the Grand Jury by mistake, were never turned over to the Grand Jury. Shortly thereafter Weiss denied to the district court having made any effort to obtain the documents from Hong Kong.

The Exclusion of Evidence Tending to Show that Melco May Not Have Realized an Overall "Profit"

In support of its settlement of the terminated contract with the Vietnam PX Melco submitted to the Exchange not only the false invoices from the two Thai suppliers but also evidence of other costs incurred, including outlays for supplies, travel expenses, equipment, office rental, automobile purchases and rentals, advertising, and the like. None of these latter charges were alleged by the government to have been falsified or inflated. Nor were they the subject of any charges in the indictment. Nevertheless Weiss and the corporate defendants sought to introduce proof at trial that it had understated these merchandising expenses and that Melco's total costs and expenses in connection with the contract exceeded its total proceeds received from the Exchange under the termination agreement, leaving it no profit.

Weiss argues that the trial court's exclusion of the foregoing evidence of merchandising expenses was error, in view of the prosecutor's repeated statements to the jury that the defendants had realized a "secret profit" from the

alleged fraud. We disagree. The argument distorts the charge against the defendants and the meaning of the word "profit" as used in context by the government. The indictment alleged, and the evidence established, that by use of false invoices and other fraudulent representations Weiss and Melco knowingly induced the Exchange to buy a greater quantity of Thai merchandise than it was actually obligated to purchase and to pay higher prices for the goods than those which it would have been required to pay if the truth had been revealed. The "secret profit" referred to by the prosecutor clearly referred to the fraudulent mark-up or difference between the actual and falsely inflated prices for the goods, including the prices for merchandise which Melco falsely represented itself as being committed to buy when it was not.

Whether or not Melco realized an *overall* profit or loss on its settlement of the entire contract was irrelevant. The proof established that if it had disclosed the facts with respect to its actual commitment and purchase prices it would not have succeeded in inducing the Exchange to obligate itself to pay for the larger amount of the merchandise claimed or the higher prices charged for that merchandise.

United States v. *Wertheimer,* 434 F.2d 1004 (2d Cir. 1970), relied on so heavily by Weiss and the corporate defendants, is distinguishable from the present case, we think, since it involved much more than a possible loose but entirely reasonable use of terms by the government. In that case the defendant was charged with falsely certifying that he had shipped merchandise to an agency of the United States government when in fact it had not been shipped at the time of the certification. Eventually, as the government knew, the merchandise was shipped and delivered to it. Nevertheless at trial the government prosecutor flatly stated to the jury that the shipments, for

which the government had paid $25,000, "were not made," thus seriously prejudicing the defendant by deliberately misrepresenting objective facts not material to the charge and giving the jury the impression that the government had been cheated out of $25,000. Here, on the other hand, the government prosecutor merely used the words "profit" and "markup" interchangeably in referring to the defendants' conduct in secretly adding 10 to 25% onto the cost of goods sold by them to the government, with the result that the government paid higher prices than it otherwise would have paid. Under the circumstances there was little danger that the jury would interpret the prosecutor's occasional use of the word "profit" instead of "markup" as any assertion at all concerning the immaterial issue of *overall* profit. We cannot, therefore, ascribe to these references prejudice such as existed in *Wertheimer*.

The Exclusion of Leon Weiss' Passports

In an effort to prove that he was not in Bangkok at the time of certain conspiratorial meetings with McElroy Weiss, without any testimonial foundation, offered two United States passports which had purportedly been issued to him and bore no stamps or entries indicating that he was in Thailand during the relevant period. The trial court excluded the passports on the ground that they had not been authenticated properly.

Weiss contends that the passports should have been admitted without testimonial authentication as "official records" pursuant to Rule 27, F.R.Cr.P., which permits proof of an official record in the same manner as in civil actions, and Rule 44(a), F.R.Civ.P.[1] Weiss first argues that a

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1 "(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when

passport is an "official record," as that term is used in Rule 44(a), because it is issued by the Secretary of State for use as an authentic travel document attesting to the identity and nationality of the bearer, 8 U.S.C. §1101(a)(30), 22 C.F.R. §51.1(e) (1973 ed.), see *United States* v. *Laub*, 385 U.S. 475, 481 (1967), it bears the seal of the Department of State, it remains the property of the United States, it is returnable on demand, 22 C.F.R. §51.9 (1973 ed.), and it may be altered or stamped only by authorized domestic or foreign officials. Undoubtedly a passport may properly be described as an "official" document in the sense that it is issued by the government and represents a request by the government to give safe passage to the bearer. See *Lynd* v. *Rusk*, 389 F.2d 940, 947 (D.C. Cir. 1967). However, a passport, being in the custody of the citizen to whom it is issued, does not satisfy the further requirements of Rule 44(a) that the document be "kept within the United States" and be in the "custody" of an officer of the government.

In the alternative Weiss argues that even though a passport may not itself qualify as an "official record" it does qualify as an "official publication thereof," which satisfies the requirements of Rule 44(a) for authentication since it bears the seal and stamp of the Department of State attesting to certain facts concerning the holder which are a matter of official record with the government, i.e., his

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admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office."

birth, citizenship, address, etc. Our attention is drawn to authority indicating that a district court should be permitted in its discretion, absent a claim that a passport is counterfeit or spurious, to admit it into evidence where it would be probative of an issue in dispute, such as the holder's citizenship, without the necessity of requiring a party to subpoena government officials to testify to the obvious. See *Pereira* v. *Murff*, 169 F. Supp. 81, 84 (S.D.N.Y. 1958).

Here, however, we need not face that issue because the Weiss passports were not offered simply to prove matters of record in the Department of State but would be competent only upon introduction of proof by authorities of Thailand that if Weiss had entered or left that country during the relevant period entries would surely have been placed upon the passports. Absent such proof the exclusion of the passports as not competent was not clearly erroneous. Furthermore, even if such evidence had been introduced, it would at best have cast doubt on McElroy's testimony that he had met Weiss in Bangkok in May or June 1967. McElroy, however, testified that he could not be certain of the time, which he described as "approximate." Thus, even assuming *arguendo* that the exclusion of the evidence was error, it was harmless.

The Sufficiency of Count 19

Count 19 (renumbered as such after former Counts 18-22 were dismissed) charged, essentially in the language of 18 U.S.C. §1503, that the Weisses corruptly endeavored to obstruct justice by failing to produce documents which Weiss was commanded to produce by the subpoena issued by the Grand Jury investigating the alleged fraudulent scheme. The trial court, recognizing that the term "corruptly" as used in the statute requires proof of more than

mere failure to produce the documents, instructed the jury that in order to find the Weisses guilty it must find some affirmative conduct on their part, such as destruction, concealment or removal of the documents. The jury had before it sufficient evidence to enable it so to find.

The Weisses, however, argue that the indictment was insufficient on its face for failure to allege, more specifically than failure to produce documents, the conduct by which they corruptly endeavored to obstruct justice. We disagree. Such details need not be alleged as long as the indictment furnishes sufficient information as to the time, place and essential elements of the crime to enable the defendants to prepare for trial and avoid a claim of double jeopardy. *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2nd Cir. 1973). The present indictment satisfied these requirements. The defendants at no time argued that they were unprepared to meet the government's proof. Although they sought particulars, including a list of the documents not produced, the Weisses made no demand for further details as to the conduct constituting the alleged "corrupt" endeavor to obstruct the investigation. Nor did they seek a continuance when the government, within a day after the Weisses first moved to dismiss Count 19, outlined its proof as to that count. In short, they were sufficiently apprised of the charge to enable them to prepare and defend with respect to it.

The Joinder of Mrs. Weiss

Mrs. Weiss, who is named as a defendant in Count 19 (charging obstruction of justice) only, argues that she was improperly joined with the other defendants in violation of Rule 8(b), F.R.Cr.P., and that it was error not to have granted her motion for a severance and separate

trial of the offense charged against her. Rule 8(b) provides:

> "(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The key question is whether Mrs. Weiss participated in the "same series of acts or transactions constituting an offense or offenses." She contends that since she did not play any part at all in the underlying scheme to defraud, which formed the basis of the first 18 counts against the other defendants, and since the conduct upon which the obstruction of justice charge against her did not take place until two years after the completion of that scheme, she cannot be said to have participated in the same series of acts or transactions constituting an offense or offenses. See *United States* v. *Granello,* 365 F.2d 990, 993-94 (2d Cir. 1966), *cert. denied,* 386 U.S. 1019 (1967); *United States* v. *Leach,* 429 F.2d 956, 960 (8th Cir. 1970), *cert. denied,* 402 U.S. 986 (1971). The government, on the other hand, argues that since the purpose of the alleged obstruction of justice was to prevent it from adducing proof of the underlying scheme the situation is analogous to cases holding that charges of attempted concealment or cover-up of a crime are sufficiently connected with the crime itself to permit joinder. See *United States* v. *Carson,* 464 F.2d 424, 436 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); *United States* v. *Sweig,* 441 F.2d 114, 118-19 (2d Cir.), *cert. denied,* 403 U.S. 932 (1971).

While joinder of two or more offenses against the same defendant have been permitted pursuant to Rule 8(a) in the decisions cited by the government, this hardly supports joinder of different defendants upon separate charges under Rule 8(b), which is more restrictive. See *United States* v. *Granello, supra,* pp. 993-94. However, we need not decide this difficult question in the present case since, even assuming Mrs. Weiss was improperly joined, she has failed to show any prejudice to herself as a result of the joinder. If Count 19 had been tried separately, the government would have been allowed to introduce most if not all of the proof the underlying fraudulent scheme in order to establish her motive, as Weiss' wife, to play a major part in obstructing the government's investigation into that scheme by removing material proof of her husband's participation in it. See *United States* v. *Granello, supra,* p. 995; *United States* v. *Roselli,* 432 F.2d 879, 901 (9th Cir. 1970). Lastly Mrs. Weiss was further protected against "spillover" prejudice by the court's instructions to the jury, repeated on four occasions, that it must consider each charge against each defendant separately on the basis solely of the evidence introduced with respect to the defendant on that count. That the jury followed this instruction is evidenced by its specific request for a rereading of the court's charge relating to Mrs. Weiss.

The Conduct of the Trial

All defendants contend that they were denied a fair trial because of prejudicial conduct, rulings and statements on the part of the trial judge during the nine-day trial. See, e.g., *United States* v. *Nazzaro,* 472 F.2d 302 (2d Cir. 1973); *United States* v. *Dellinger,* 472 F.2d 340, 385-91 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973). Specifically they

point to the judge's threats to hold counsel in contempt, his order (later vacated) holding one defense attorney in contempt, his rebukes of defense counsel and deprecatory remarks regarding their conduct of the defense, his interference with the examination of witnesses and his disparaging comments regarding the defense. A rather impressive array of rebukes, threats and harsh statements by the trial judge, taken out of context, are quoted in appellants' briefs as demonstrating that the judge displayed to the jury such favoritism toward the government, such bias against the defendants, and such hostility toward their counsel, that they were precluded from obtaining the impartial consideration of the evidence by the jury to which they were entitled.

As we have recently observed in *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973), the task upon appellate review of determining whether a judge's conduct has "improperly shifted the balance against a defendant" is a difficult one, especially since the printed record cannot convey the atmosphere, the tones of voice of judge, counsel and parties, and their facial expressions.[2] See *United States* v. *Boatner*, 478 F.2d 737 (2d Cir. 1973). However, we are relegated to doing the best we can with the aid of the trial transcript, bearing in mind the substance or triviality of the various matters claimed to have been the subject of prejudicial conduct or remarks on the judge's part. Experience teaches that quotations lifted out of the transcript can often be unintentionally misleading, since they usually fail to give a true or complete picture of the framework for and background of the allegedly prejudicial comments. Counsel, being advocates, also tend to attach excessive significance to some remarks and to overlook counterbalancing

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2 For instance we have no way, absent videotape and sound recording, of appraising appellants' statement that "no trial day was completely free from shouting or near-shouting by the court."

portions of the record. For these reasons it is essential, at least where appellants' brief (as here) raises a substantial issue as to the trial judge's fairness in conducting the trial, to make a "close scrutiny of each tile in the mosaic," *United States* v. *Nazzaro, supra,* p. 304, which means reading the entire trial transcript, in this case 1,280 pages. This we have done.

Many of the trial judge's comments, characterizations, and castigations of counsel would have been better left unexpressed, since they not only failed to serve any useful purpose but raised serious doubts as to the court's impartiality and judicial detachment. However, our detailed review of the record satisfies us that appellants' contentions, except for one asserted on behalf of the corporate defendants (discussed below), are grossly exaggerated. The excerpts quoted seriatim in appellants' briefs, while indicating a possible attitude of partisanship, are not truly representative of the judge's trial conduct and hence convey a distorted impression of the trial. The overwhelming bulk of the trial transcript reveals normal temperate conduct on the part of counsel and judge, with the latter limiting himself to categorical rulings on counsel's objections. As for the balance, many of the court's unfortunate comments quoted by appellants occurred outside of the jury's presence and hence could not have influenced the jury. Others were clearly provoked by defense counsel's unnecessary comments or statements in connection with their voicing of objections or by their pressing objections or arguments that were frivolous, repetitious, or in disregard of the court's earlier rulings. When defense counsel repeatedly and persistently attempts to introduce irrelevant evidence (e.g., in this case proof of merchandise expenses designed to show that no *overall* profit was realized) he must expect that once the trial judge has made his basic ruling successive objections by the government will undoubtedly be sus-

tained. Nor is it surprising that such wasteful tactics will lead a trial judge, during the heat of a nine-day trial, sometimes to become impatient. Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation.

Whatever display of impatience or irritation was exhibited by the trial judge toward defense counsel, the record further reveals that, while the judge from time to time took defense counsel to task, he did not hesitate likewise to express disapproval of some of the prosecutor's tactics and to sustain numerous defense objections. On the whole, therefore, the trial judge, while openly displaying displeasure on some occasions, was relatively even-handed. We cannot conclude from our thorough examination of the transcript that he displayed partisanship amounting to prejudicial error, or that his heated outbursts were "pervasive," see *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). In the few instances where he questioned witnesses his queries appear to have been for the purpose of clarifying the record and not "designed to inject doubt or uncertainty as to the credibility of witnesses," see *United States* v. *Nazzaro, supra.* As we have often reminded parties "[a] defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). While many of the judge's comments were improper, they did not singly or cumulatively approach the level of such harshness or contempt for the defense as to amount to denial of a fair trial. See *United States* v. *Dellinger, supra.*

The trial court's treatment of counsel for the corporate defendants, on the other hand, stands on a different footing. Approximately one month prior to trial Judge MacMahon assigned William S. Hack, who had acted as at-

torney for the corporate defendants in certain matters, to defend them in this criminal case. Thereupon Mr. Hack wrote a letter to the court declining the appointment on the ground that he lacked trial competence. He had never participated in a criminal trial in his life; in fact his only participation in any jury trial had been his representation, some 15 years earlier, of a low-income tenant in a dispute with his landlord. Notwithstanding Hack's lack of qualifications to represent the corporate defendants at trial the judge, refusing to listen to or to accept Hack's protestations of incompetency, ordered him to represent them at trial, threatening in an open courtroom clash before trial to hold Hack in contempt and to report him to the Association of the Bar if he did not do so. Hack finally acceded after the judge at first refused to permit him to retain an experienced criminal trial lawyer to advise and assist him but later allowed the attorney to sit with him during the trial.

The conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified. Admission to the district court bar of a lawyer who has never before tried a criminal case does not *ipso facto* qualify him to act as defense counsel in a complicated conspiracy trial. The proper procedure, if the corporate defendants persisted in refusing to appear by retained counsel, was to appoint a lawyer qualified to serve. Indeed, appointment of the attorney whom Hack sought to retain as his adviser would have been preferable to the course taken by the court.

Despite the impropriety in forcing Hack to serve against his will the corporate defendants did not suffer prejudice requiring a new trial of the charges against them. Although they might have chosen to defend on the theory that Weiss, McElroy and Moore had acted *ultra vires* or beyond their

authority in representing the corporations which were the subject of the indictment, such a frivolous defense would have been doomed to inevitable failure, in view of Weiss' position as controlling stockholder, president and managing agent of Melco, and the overwhelming proof of his authority and that of McElroy and Moore. In all other respects the interests of the corporations were identical with those of Weiss, who was competently and vigorously defended by able trial counsel. Any and all steps that would have been taken on their behalf by their own counsel were taken by Weiss' attorney with the same force and effect. Furthermore, Mr. Hack, while lacking any criminal trial experience and remaining mute through most of the trial, did voice essential motions on behalf of the clients to whom he was placed in bondage by the court. He briefly summed up to the jury and acted with the advice of an attorney experienced in criminal defense practice. Under the circumstances, particularly the fact that the corporate defendants gained the full benefit of Weiss' defense, we cannot say that they were denied a fair trial.

The Court's Jurisdiction Over the Corporate Defendants

The district court's jurisdiction over the corporate defendants was predicated on the appearance as a defendant of Leon Weiss, their principal officer and controlling stockholder, and the government's mailing of copies of the summons to each corporation at various addresses, including those overseas and its last known address in New York City, and to the New York Department of State in Albany. However, in response to a pretrial motion by the government to ascertain whether Weiss was a managing agent for the corporations and for appointment of counsel to represent them, Weiss' counsel claimed that he was not their agent, and that they were not doing business in New

York which would subject them to the court's jurisdiction. The court, refusing a hearing requested by the government and Weiss' counsel, found that the corporate defendants were within its jurisdiction and that Weiss was their managing agent.

Upon the record we cannot conclude that the corporations were subject to the court's jurisdiction at the time of filing of the indictment (i.e., February 1973), which is the operative time for jurisdictional purposes, whatever may have been their activities in New York during prior years. The burden was upon the government to establish current jurisdictional facts. If, as was contended by Weiss' counsel, the corporations had long since left the jurisdiction, service of process on their former managing agent or upon the Secretary of State would be unavailing to confer jurisdiction upon the court.

For these reasons the case against the corporate defendants must be remanded to the district court with directions to hold a hearing for the purpose of determining whether they were present within the jurisdiction at the time of indictment and whether Weiss continued to be their managing agent at that time.

We have considered the other arguments advanced by appellants and find them to be without merit.

The convictions of Mr. and Mrs. Weiss are affirmed. The judgment against the corporate defendants is remanded for further proceedings consistent with this opinion.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January, one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN,

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Leon Weiss, Ethel Weiss, Melco International, Ltd., and Melco International, Inc.,

Defendants-Appellants.

73-1964, 5, 6, 7

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments as to appellants Leon and Ethel Weiss be and they hereby are affirmed.

It is further ordered, adjudged and decreed that the actions as to appellants Melco International, Ltd. and Melco International, Inc. be and they hereby are remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

ORDERS DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of March, one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. WILLIAM HUGHES MULLIGAN,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Docket No. 73-1964

Leon Weiss, Ethel Weiss, Melco International, Ltd., and Melco International, Inc.,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant (Leon Weiss),

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

* * * *

A petition for a rehearing having been filed herein by counsel for the appellant (Ethel Weiss),

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

* * * *

A petition for a rehearing having been filed herein by counsel for the appellants (Melco International Ltd., and Melco International, Inc.),

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX D

ORDERS DENYING REHEARING IN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of March, one thousand nine hundred and seventy-four.

United States of America,

Plaintiff-Appellee,

v.

Docket No. 73-1964

Leon Weiss, Ethel Weiss, Melco International, Ltd., and Melco International, Inc.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant (Leon Weiss) and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

* * * *

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant (Ethel Weiss), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

* * * *

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants (Melco International Ltd., and Melco International, Inc.), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX E

Supreme Court of the United States

No. A-952

LEON WEISS, *ET AL.*,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20, 1974.

Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 9th

day of April, 1974.

APPENDIX F

THE TRIAL JUDGE'S DISPARAGING COMMENTS AND DEPRECATORY REMARKS DIRECTED AGAINST DEFENSE COUNSEL AND THEIR CONDUCT OF THE DEFENSE

1. *Disparaging Comments on Defense Counsel's Method of Direct and Cross-Examination.* During the course of cross-examination, the lower court broke into Mr. Ritholz' questioning and said: "Save your summation, please, Mr. Ritholz. . . . I don't care what you are trying to do. We have rules of procedure and I insist on your following them" (2 J.A. 164).

Throughout cross-examination, the court in the presence of the jury constantly took issue with the relevancy of counsel's questions:

– "Oh baloney, I preclude that line of cross-examination. Please you know this case. Hold it to relevant lines of testimony." (2 J.A. 72)

– "Can't you go, Mr. Ritholz, directly to your point here without wandering all over it?" (2 J.A. 72)

– "Go on, you are way off base." (2 J.A. 73)

– "Oh baloney. . . . You have got some weird ideas if I ever saw them. . . . It has no apparent relevancy." (2 J.A. 107)

– "It better get relevant pretty soon or we will terminate it. We have now been 20 minutes and we haven't been relevant yet." (3 J.A. 202)

In another instance, the court raised a question as to counsel's ability to cross-examine: "It might help if you

lead. You are cross-examining, I suppose" (2 J.A. 79; *see* 2 J.A. 103).

On other occasions in the presence of the jury the court remarked that counsel's questions were incomprehensible:

– "Please, Mr. Ritholz, will you please put intelligible questions?" (2 J.A. 79)

– "[T]he witness can answer if he can understand it. I don't. Maybe he can." (2 J.A. 162)

– "Don't interrupt, Mr. Ben-Veniste [prosecutor]. It isn't going anywhere anyway." (3 J.A. 205)

Finally, the court brought into serious question defense counsel's honesty and candor. Thus, at one point the court, in answer to the prosecutor's objection, admonished defense counsel: "If you want to testify, you may do so, but from the witness [stand]," and then failed to offset the prosecutor's added comment: "Under oath" (3 J.A. 256).

2. *Disparaging Comments on Defense Counsel's Method of Making Proffers of Evidence.* Comments on relevancy, intelligibility and competency were again prominent whenever defense counsel attempted to make any proffer of proof. Thus, as to relevancy:

– "It is patently irrelevant and immaterial" (3 J.A. 261-62)

– "Mr. Ritholz, I have never seen a lawyer with less sense of relevance, never. What is your proof with this witness?" (3 J.A. 296)

– "I just want to make sure [the exhibit] . . . doesn't have to do with the Empire State Building." (3 J.A. 303)

– "I don't see how it is relevant to this case in any conceivable way other than to confuse everybody and clutter the record." (3 J.A. 304)

The court, in the jury's presence, was exceptionally caustic in its comments on counsel's competency: "I don't know what you are driving at. I don't think a clairvoyant can tell" (2 J.A. 105). With respect to defense counsel's attempt to elicit evidence as to the so-called "pipeline problem" of obtaining silk goods, the judge stated: "Well, maybe you can do it without going back to the silkworm" (2 J.A. 160).

In another instance, the court stated: "I can't help you, Mr. Ritholz. I can't help you. If you think that, I can't help you. It is hopeless" (3 J.A. 286). On still another occasion, the court became sarcastic (3 J.A. 287-88):

"THE COURT: . . . You have no sense of what is relevant at all.

"MR. RITHOLZ: Before the jury comes in, your Honor, I have other things. We might as well get it cleared up.

"THE COURT: I can't clear it up. I'd have to go back to grammar school.

"MR. RITHOLZ: Do you want me to hold them, your Honor?

"THE COURT: Proceed. I didn't retain you. Do your job the best you can."

A final example of caustic comment by the court related to the attempt by Mr. Ritholz to ascertain through a witness "whether he knew the general reputation of [the government's chief witness] McElroy for veracity and truthfulness in his field of employment and in the communities in which he lives" (3 J.A. 252). To which, the following colloquy ensued (3 J.A. 252-53):

"THE COURT: Do you mean it? Are you serious?

"MR. RITHOLZ: Yes, your Honor, I am bringing this out as an offer of proof before you now. And my reliance on that, among other things, is a decision in U.S. vs. Dardi of this Circuit, where . . . this Circuit in passing mentions that procedure having been followed without criticism. . . .

"THE COURT: Where was it followed: In some Harvard Law Review or something, or was it a courtroom?

"MR. RITHOLZ: I don't know. I also refer your Honor to the proposed rules of evidence, which do permit it. In Rule 608(a) of the Proposed Rules of Evidence.

"THE COURT: Those rules of evidence have been turned down by Congress, and I hope permanently, but I will hear what they have to say, because the Court of Appeals seems to be concerned with the proposed rules.

* * * *

"THE COURT: The Circuit seems to be following the proposed rules no matter how radical or how much they differ from the traditional rules. . . . Especially if they get some Judge from Vermont or somewhere sitting up there, you have had it."

3. *Disparaging Comments on Defense Counsel's Voicing Objections.* During the course of trial, the judge constantly berated counsel for offering explanations of their objections. Typical comments included:

– "I heard the question. I don't need your speeches." (2 J.A. 17)

– "I understand English, Mr. Ritholz. I understand it very clearly. Overruled, if that is an objection, which it isn't." (2 J.A. 53)

– "Just ask for a voir dire without the speech, please." (2 J.A. 54)

– "Overruled. I don't want argument." (2 J.A. 115)

In an objection concerning a leading question during the course of the government's direct examination, the judge and counsel again entered into an acrimonious exchange (2 J.A. 131):

"MR. RITHOLZ: Objection. He said he did not remember.

"THE COURT: Overruled. He said his best recollection was that it was before.

"THE COURT: We can hear what he said. Just voice your objections.

"MR. RITHOLZ: I think the witness is being led.

"THE COURT: Voice your objections in terms of the rules of evidence, Mr. Rittenholz.

"MR. RITHOLZ: My name is Ritholz, sir.

"THE COURT: All right, whatever it is."

4. *Disparaging Comments on Defense Counsel's Presentation of Legal Argument.* In moving to dismiss the substantive Counts 2 through 17, defense counsel offered an argument with respect to what the invoices showed. To which the lower court replied: "That is the most specious argument I have ever heard" (3 J.A. 220). Following further argument, the court responded: "That is the second most specious argument I have ever heard" and refused to hear further argument on the point (3 J.A. 221).

On another occasion, the court took a legal memorandum prepared by defense counsel and threw it out into the courtroom, saying, "That memorandum is useless" (3 J.A. 203). Then, the following exchange took place (3 J.A. 204):

> "MR. BRILL: Your Honor, I must say I don't appreciate having papers that we work late into the night on thrown around the courtroom by the Court with total –
>
> "THE COURT: Save your statements for the Court of Appeals. I am certainly entitled –
>
> "MR. BRILL: I think I am entitled, as an officer of this Court, to your Honor's consideration.
>
> "THE COURT: I read it. It is useless."

The court's attitude of impatience and annoyance was also displayed when defense counsel submitted their supplementary requests toward the end of trial (3 J.A. 305):

> "Oh, come on. I'm not going to wade through all of these at this late date. Do you think I have a lot of little gnomes that do these things for me? I have to stay down here at night and day with this nonsense that you have given me. You have had months to prepare it."

* * * *

APPENDIX G

EXTRACT FROM GOVERNMENT'S BRIEF ON APPEAL

POINT VI

The District Court's jurisdiction over the corporate defendants was not clearly established by the record below and the question of whether or not Leon Weiss was a managing or general agent for the corporations should be determined at a hearing after remand. The corporations nevertheless were represented below and were not prejudiced by their attorney's failure vigorously to defend them.

While Leon Weiss was present at all stages of the trial proceedings below, it was contended below and is contended on this appeal that the defendant corporations, Melco International, Inc. and Melco International, Ltd., had not properly been summoned before the Court pursuant to Rule 9(c), Fed. R. Crim. Proc., and that therefore jurisdiction over these corporations was never obtained. But since appearance in the proceedings by the corporations obviates the necessity for service by subpoena, and since Leon Weiss was within the Court's jurisdiction throughout the proceedings below, the question is whether, during the proceedings below, Leon Weiss was an agent of the corporations. Since the proceedings below established only that Leon Weiss had been an agent for these corporations from 1967 through 1971, but did not establish that he continued to be an agent in 1973,* the case as to the corporations should be re-

* The Court's finding below was based primarily upon an affidavit by the Government attorney which set forth facts indicating that Leon Weiss had been an agent for the corporations from 1967 through 1969 and continued to be an agent in 1971.

(Cont'd)

manded to the District Court for a hearing to determine whether Leon Weiss was an agent during the proceedings in 1973.**

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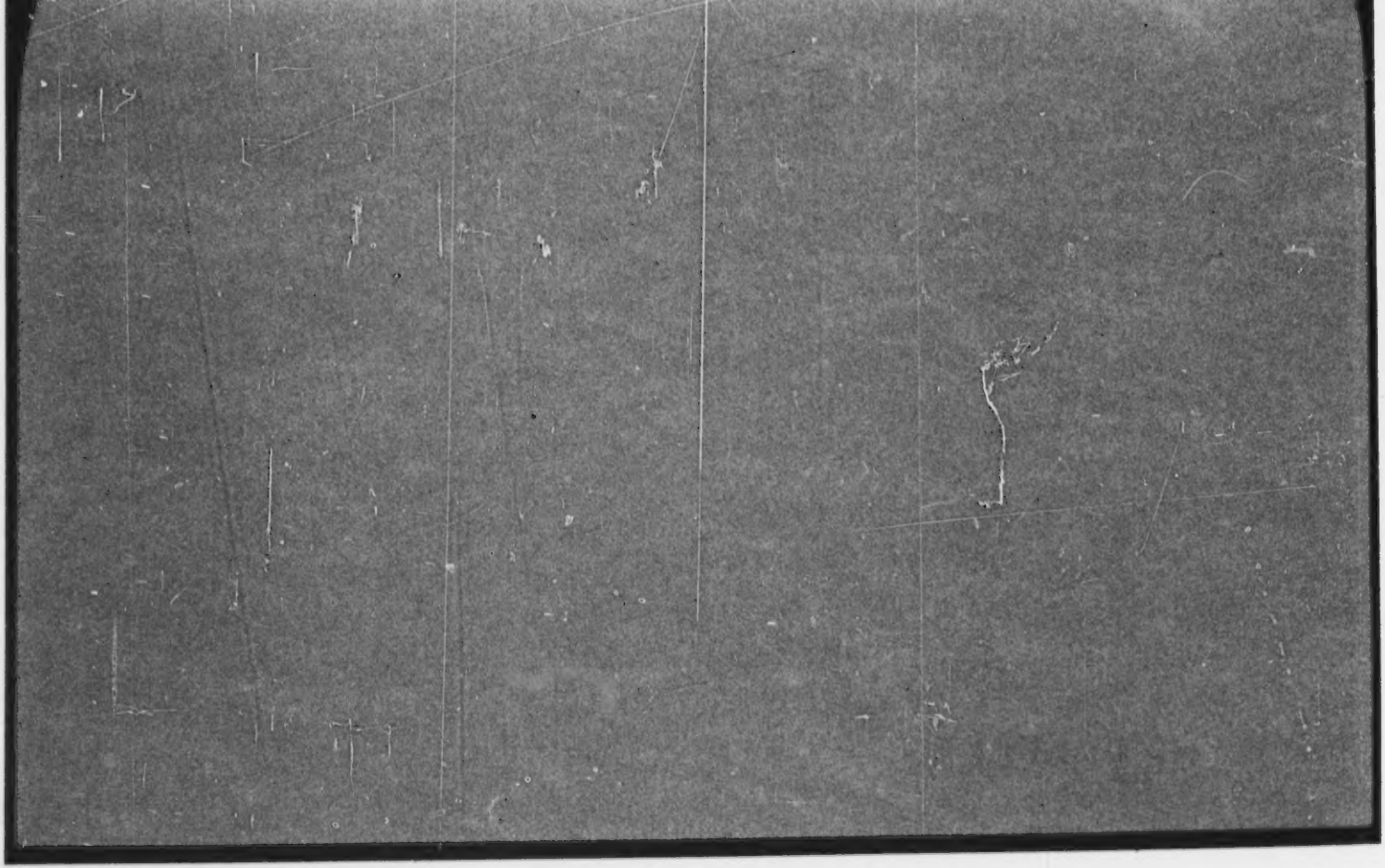
* (Cont'd)

The defense attorney submitted an affidavit denying, upon information and belief, that Leon Weiss was an agent in 1973. On March 16, 1973, Judge MacMahon, without a hearing, found that Weiss was an agent.

** See *United States* v. *Bynum*, 475 F.2d 832 (1973).



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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1736

LEON WEISS, ETHEL WEISS, MELCO INTERNATIONAL, LTD., AND MELCO INTERNATIONAL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

All petitioners contend that they were denied a fair trial by the conduct of the trial judge; petitioners Leon and Ethel Weiss contend that the obstruction of justice count in their indictment was not sufficiently specific to assure that they were tried for the same offenses considered by the grand jury; petitioner Ethel Weiss contends that the district court committed reversible error in denying her motion for severance; and the corporate petitioners contend that they were denied effective assistance of counsel and that the court of appeals erred in remanding for a determination of whether the court had *in personam* jurisdiction over them.

After a jury trial in the United States District Court for the Southern District of New York, petitioners Leon Weiss, Melco International, Inc., and its wholly-owned subsidiary Melco International, Ltd., were convicted of (1) conspiracy to violate 18 U.S.C. 1001 and 1031 by causing false invoices and documents to be submitted to the Army and Air Force Exchange of the Department of Defense (hereinafter "Exchange") (Count 1); (2) causing invoices containing false statements to be submitted to an agency of the Exchange, in violation of 18 U.S.C. 1001 and 2 (Counts 2-17); and (3) mail fraud in furtherance of the scheme, in violation of 18 U.S.C. 1341 (renumbered Count 18). Petitioners Leon and Ethel Weiss were also convicted of corruptly endeavoring to obstruct justice by failing to produce documents subpoenaed by the grand jury, in violation of 18 U.S.C. 1503 (renumbered Count 19). Leon Weiss was sentenced to nineteen concurrent terms of 18 months' imprisonment and fined a total of $176,000. Ethel Weiss was sentenced to one year's imprisonment and fined $5,000, but her prison sentence was suspended and she was placed on probation for one year. Melco International, Ltd., and Melco International, Inc., were each fined $11,000. The court of appeals affirmed the convictions of Leon and Ethel Weiss. As to the corporate defendants, the court rejected their contentions on the merits, but remanded the case to the district court with directions to hold a hearing as to whether the court had jurisdiction over them (Pet. App. A, p. 19a).

The evidence is set forth fully in the opinion of the court of appeals (Pet. App. A, pp. 3a-6a). Briefly, the record reveals a scheme engineered by Leon Weiss to defraud the Army and Air Force Exchange of thousands of dollars upon the termination of a concession agreement with the

Vietnam Regional Exchange by inflating the actual costs incurred in connection with performance of the contract, thus falsely increasing the amounts to which the corporations controlled by petitioner[1] would be entitled by way of settlement.

Ethel Weiss became involved in the scheme after the grand jury began an investigation into Weiss's activities and issued a subpoena to Leon Weiss ordering the production of invoices and records relating to the settlement of the Vietnam Exchange contract. Thereupon, Mrs. Weiss, after discussing the matter with her husband, made a secret trip from New York to Hong Kong, where she obtained the incriminating invoices showing the actual prices paid in the performance of the contract. She took these documents to Switzerland, and, except for a copy of one such invoice apparently furnished by mistake, they were never given to the grand jury. Shortly thereafter, Leon Weiss denied to the district court that he made any effort to obtain the documents from Hong Kong.

1. Petitioners' contention that they were denied a fair trial by the conduct of the trial judge was thoroughly explored and properly rejected in the opinion of the court of appeals, on which we rely. The court stated (Pet. App. A, pp. 15a-18a):

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[1]The proof at trial showed that from 1966 through 1969, Leon Weiss was the president and controlling stockholder of Melco International, Inc., a Liberian corporation which represented various manufacturers on a commission basis in sales to the Military Post Exchange Services in the Far East. Early in this period, Melco International, Ltd., a wholly-owned subsidiary of Melco International, Inc., was incorporated in Hong Kong to handle goods of non-American manufacture. During this time Weiss operated his various enterprises from New York, where he resided and maintained offices (T. 53-55, 128, 247-248, 322, 451, 484-487; Government Exhibit 61) ("T." refers to the trial transcript).

Many of the trial judge's comments, characterizations, and castigations of counsel would have been better left unexpressed, since they not only failed to serve any useful purpose but raised serious doubts as to the court's impartiality and judicial detachment. However, our detailed review of the record satisfies us that appellants' contentions, except for one asserted on behalf of the corporate defendants (discussed below), are grossly exaggerated. The excerpts quoted seriatim in appellants' briefs, while indicating a possible attitude of partisanship, are not truly representative of the judge's trial conduct and hence convey a distorted impression of the trial. The overwhelming bulk of the trial transcript reveals normal temperate conduct on the part of counsel and judge, with the latter limiting himself to categorical rulings on counsel's objections. As for the balance, many of the court's unfortunate comments quoted by appellants occurred outside of the jury's presence and hence could not have influenced the jury. Others were clearly provoked by defense counsel's unnecessary comments or statements in connection with their voicing of objections or by their pressing objections or arguments that were frivolous, repetitious, or in disregard of the court's earlier rulings. When defense counsel repeatedly and persistently attempts to introduce irrelevant evidence (*e.g.*, in this case proof of merchandise expenses designed to show that no *overall* profit was realized) he must expect that once the trial judge has made his basic ruling successive objections by the government will undoubtedly be sustained. Nor is it surprising that such wasteful tactics will lead a trial judge, during the heat of a nine-day trial, sometimes to become impatient. Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation.

Whatever display of impatience or irritation was exhibited by the trial judge toward defense counsel, the record further reveals that, while the judge from time to time took defense counsel to task, he did not hesitate likewise to express disapproval of some of the prosecutor's tactics and to sustain numerous defense objections. On the whole, therefore, the trial judge, while openly displaying displeasure on some occasions, was relatively even-handed. We cannot conclude from our thorough examination of the transcript that he displayed partisanship amounting to prejudicial error, or that his heated outbursts were "pervasive," see *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). In the few instances where he questioned witnesses his queries appear to have been for the purpose of clarifying the record and not "designed to inject doubt or uncertainty as to the credibility of witnesses," see *United States* v. *Nazzaro, supra* [472 F. 2d 302]. As we have often reminded parties "[a] defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). While many of the judge's comments were improper, they did not singly or cumulatively approach the level of such harshness or contempt for the defense as to amount to denial of a fair trial. See *United States* v. *Dellinger, supra* [472 F. 2d 340]. [2]

The trial court's treatment of counsel for the corporate defendants, on the other hand, stands on a different footing. Approximately one month prior to trial Judge MacMahon assigned William S. Hack, who

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[2] We also note the court's instruction to the jury that they were not to conclude from any rulings, questions, or remarks that he had any opinion as to the defendants' guilt or innocence (T. 1194).

had acted as attorney for the corporate defendants in certain matters, to defend them in this criminal case. Thereupon Mr. Hack wrote a letter to the court declining the appointment on the ground that he lacked trial competence. He had never participated in a criminal trial in his life; in fact his only participation in any jury trial had been his representation, some 15 years earlier, of a low-income tenant in a dispute with his landlord. Notwithstanding Hack's lack of qualifications to represent the corporate defendants at trial the judge, refusing to listen to or to accept Hack's protestations of incompetency, ordered him to represent them at trial, threatening in an open courtroom clash before trial to hold Hack in contempt and to report him to the Association of the Bar if he did not do so. Hack finally acceded after the judge at first refused to permit him to retain an experienced criminal trial lawyer to advise and assist him but later allowed the attorney to sit with him during the trial.

The conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified. Admission to the district court bar of a lawyer who has never before tried a criminal case does not *ipso facto* qualify him to act as defense counsel in a complicated conspiracy trial. The proper procedure, if the corporate defendants persisted in refusing to appear by retained counsel, was to appoint a lawyer qualified to serve. Indeed, appointment of the attorney whom Hack sought to retain as his adviser would have been preferable to the course taken by the court.

Despite the impropriety in forcing Hack to serve against his will, the corporate defendants did not suffer prejudice requiring a new trial of the charges

against them. Although they might have chosen to defend on the theory that Weiss, McElroy and Moore [overseas employees of the corporations] had acted *ultra vires* or beyond their authority in representing the corporations which were the subject of the indictment, such a frivolous defense would have been doomed to inevitable failure, in view of Weiss' position as controlling stockholder, president and managing agent of Melco, and the overwhelming proof of his authority and that of McElroy and Moore. In all other respects the interests of the corporations were identical with those of Weiss, who was competently and vigorously defended by able trial counsel. Any and all steps that would have been taken on their behalf by their own counsel were taken by Weiss' attorney with the same force and effect. Furthermore, Mr. Hack, while lacking any criminal trial experience and remaining mute through most of the trial, did voice essential motions on behalf of the clients to whom he was placed in bondage by the court. He briefly summed up to the jury and acted with the advice of an attorney experienced in criminal defense practice. Under the circumstances, particularly the fact that the corporate defendants gained the full benefit of Weiss' defense, we cannot say that they were denied a fair trial.

2. Petitioners Leon and Ethel Weiss argue that there is no assurance that they were tried on the charges deliberated upon by the grand jury because the indictment did not specify the exact conduct by which they corruptly failed to produce the evidence subpoenaed by the grand jury. This contention was raised for the first time in the court of appeals; since the objection to the indictment was not timely raised it should not be considered by this Court. *United States* v. *Fistel*, 460 F. 2d 157,

161 (C. A. 2); *United States* v. *Thompson*, 356 F. 2d 216, 226 (C.A. 2), certiorari denied, 384 U.S. 964. In any event, the point is without merit.

The indictment (renumbered Count 19, Appendix in the Court of Appeals, pp. 18-19) charged that:

> From on or about March 5, 1971, up to and including the date of the filing of this indictment, * * * LEON WEISS and ETHEL WEISS * * * knowingly did corruptly endeavor to obstruct * * * the due administration of justice by failing to produce documents * * * which * * * had been subpoenaed by a Federal Grand Jury * * * [investigating the fraud charged in the previous counts of the indictment].

In a pre-trial demand for a Bill of Particulars, petitioners requested and received a list of the documents which were not produced (*id.* at 20); they did not ask for details as to the manner in which they "endeavored to obstruct" (Pet. App. A, p. 11a). At trial, petitioners moved to dismiss count 19 on the grounds that the mere failure to produce subpoenaed documents did not constitute a crime under 18 U.S.C. 1503 and that the indictment did not charge specific conduct by which they failed to produce the documents. As a result of this motion, the trial court instructed the jury that proof of some corrupt act such as suppression or concealment was necessary for conviction and that mere failure to produce was not sufficient (Pet. 17-18). The evidence clearly established such corrupt conduct, although it is not clear that such a finding was necessary under Section 1503. Cf. *United States* v. *Alo*, 439 F. 2d 751, 754 (C.A. 2), certiorari denied, 404 U.S. 850.

Petitioners do not claim the indictment was insufficient to apprise them of the nature of the charges or to protect them from possible double jeopardy, but only that it was not precise enough to assure them that they were tried on the same charge deliberated upon by the grand jury. On the facts of this case the argument is specious. The indictment adequately informed petitioners of the specific offense with which they were charged. *Russell* v. *United States*, 369 U.S. 749; *Wong Tai* v. *United States*, 273 U.S. 77, 81. The fact that petitioners did not seek in their bill of particulars any details as to the nature of the corrupt endeavor clearly demonstrates that they knew what conduct was being charged by the grand jury.[3]

3. Petitioner Ethel Weiss contends that the trial court committed reversible error in denying her motion for severance. Here again we rely on the opinion of the court of appeals (Pet. App. A, pp. 12a-13a):

> The key question is whether Mrs. Weiss participated in the "same series of acts or transactions constituting an offense or offenses." She contends that

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[3] *Van Liew* v. *United States*, 321 F. 2d 664 (C.A. 5), cited by petitioners (Pet. 30-31), is inapposite. In that case the defendants had been charged in an omnibus indictment merely citing various statutes; four counts of the indictment encompassed eleven possible separate crimes and two other counts encompassed six possible different crimes. The court held that the indictment did not specify the crimes for which the defendants had been indicted. *Id.* at 671, 673. In the instant case, only one crime was charged in the count at issue, namely the corrupt failure to produce documents which had been subpoenaed. It was not necessary for the indictment to spell out all the evidentiary details, that is, whether the corrupt endeavor was made by destruction, concealment, or alteration of the documents; such information could have been discovered by a bill of particulars. *Id.* at 670.

since she did not play any part at all in the underlying scheme to defraud, which formed the basis of the first 18 counts against the other defendants, and since the conduct upon which the obstruction of justice charge against her [was based] did not take place until two years after the completion of that scheme, she cannot be said to have participated in the same series of acts or transactions constituting an offense or offenses. See *United States* v. *Granello*, 365 F. 2d 990, 993-94 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *United States* v. *Leach*, 429 F. 2d 956, 960 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). The government, on the other hand, argues that since the purpose of the alleged obstruction of justice was to prevent it from adducing proof of the underlying scheme the situation is analogous to cases holding that charges of attempted concealment or cover-up of a crime are sufficiently connected with the crime itself to permit joinder. See *United States* v. *Carson*, 464 F. 2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Sweig*, 441 F. 2d 114, 118-19 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

While joinder of two or more offenses against the same defendant have been permitted pursuant to Rule 8(a), Fed. R. Crim. P., in the decisions cited by the government, this hardly supports joinder of different defendants upon separate charges under Rule 8(b), which is more restrictive. See *United States* v. *Granello, supra*, pp. 993-94. However, we need not decide this difficult question in the present case since, even assuming Mrs. Weiss was improperly joined, she has failed to show any prejudice to herself as a result of the joinder. If Count 19 had been tried separately, the government would have been allowed to introduce most if not

> all of the proof [of] the underlying fraudulent scheme in order to establish her motive, as Weiss' wife, to play a major part in obstructing the government's investigation into that scheme by removing material proof of her husband's participation in it. See *United States* v. *Granello, supra,* p. 995; *United States* v. *Roselli,* 432 F. 2d 879, 901 (9th Cir. 1970). Lastly Mrs. Weiss was further protected against "spillover" prejudice by the court's instructions to the jury, repeated on four occasions, that it must consider each charge against each defendant separately on the basis solely of the evidence introduced with respect to the defendant on that count. That the jury followed this instruction is evidenced by its specific request for a rereading of the court's charge relating to Mrs. Weiss.

While agreeing with the court below that Ethel Weiss failed to demonstrate any prejudice from the joint trial, we also submit that, in the circumstances of this case the joinder was proper. See *United States* v. *Gullia,* 304 F. Supp. 30 (W.D. Pa.). Cf. *United States* v. *Honesty,* 459 F. 2d 1279, 1282, n. 4 (C.A. D.C.). In the cases cited by petitioner (Pet. 33), certain defendants were held to have been improperly joined because the offenses charged were unconnected or unrelated to the charges against the main defendants. In the instant case, the obstruction of justice charge grew out of and was intimately connected with the fraud charges.

4. Melco International, Inc., and Melco International, Ltd., contend that they were denied effective assistance of counsel. We have already quoted the relevant portion of the opinion of the court of appeals in which that submission was rejected, *supra,* pp. 6-7. We add only that, in view of the claim of the corporations at trial that they were not within the jurisdiction of the court,

Mr. Hack's abstention from participation in most of the trial may well have been the result of defense strategy.

5. Finally, the corporate defendants contend that the court of appeals erred in remanding for a jurisdictional hearing. The court found that the jurisdictional issue could not be determined without a hearing, which had been requested by counsel for both sides prior to trial. Accordingly, a remand was ordered (Pet. App. A, p. 19a). This was entirely proper: the district court, by refusing the request for a hearing, deprived the government of the opportunity to prove jurisdiction.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[4] *Danziger* v. *United States*, 161 F. 2d 299 (C.A. 9), cited by petitioners (Pet. 39), is inapposite. In that case, apparently the government did not offer to present evidence on the jurisdictional question.

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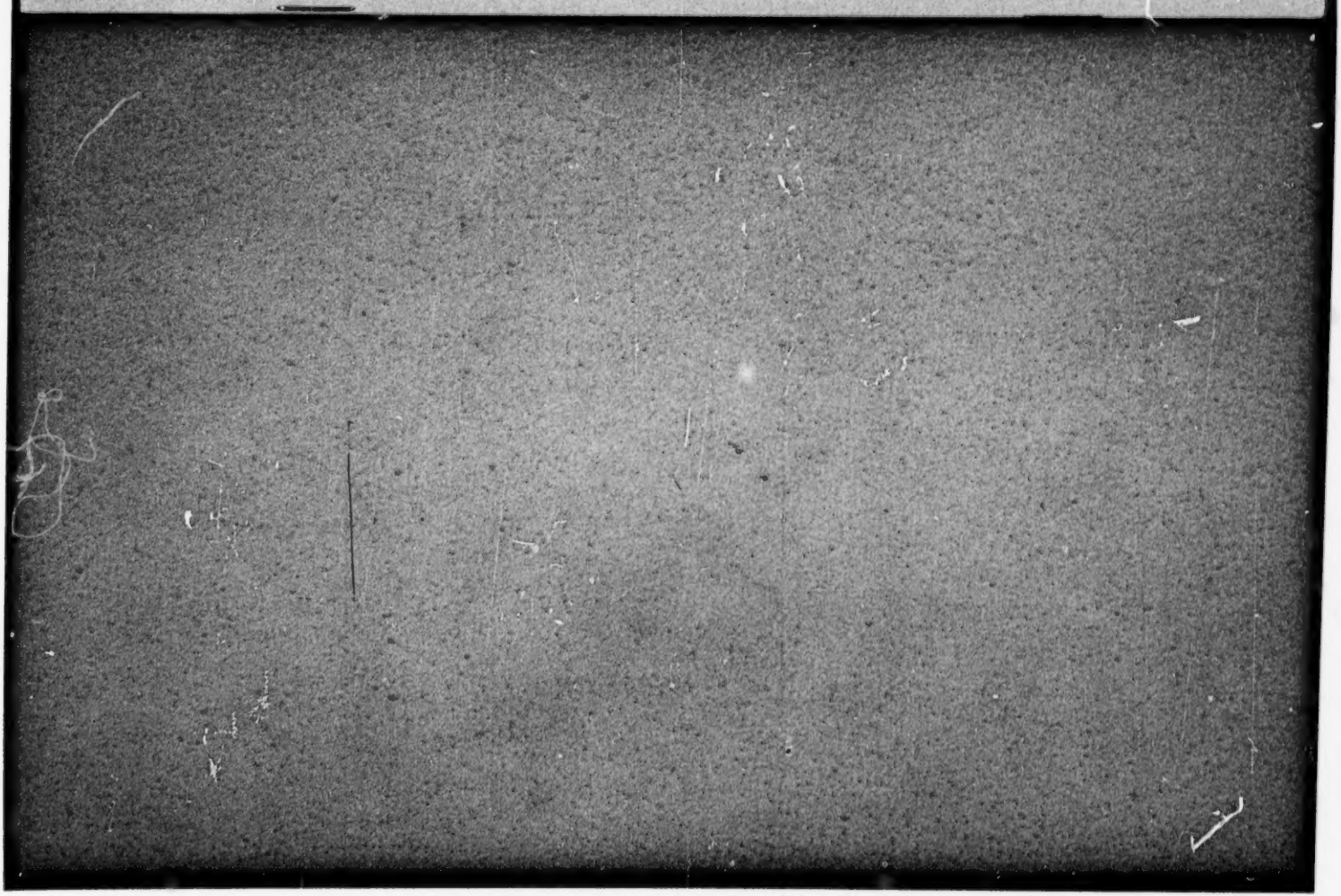

SEP 27

IN THE

Supreme Court of the United States

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MELCO INTERNATIONAL, LTD., and
MELCO INTERNATIONAL, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY MEMORANDUM FOR PETITIONERS

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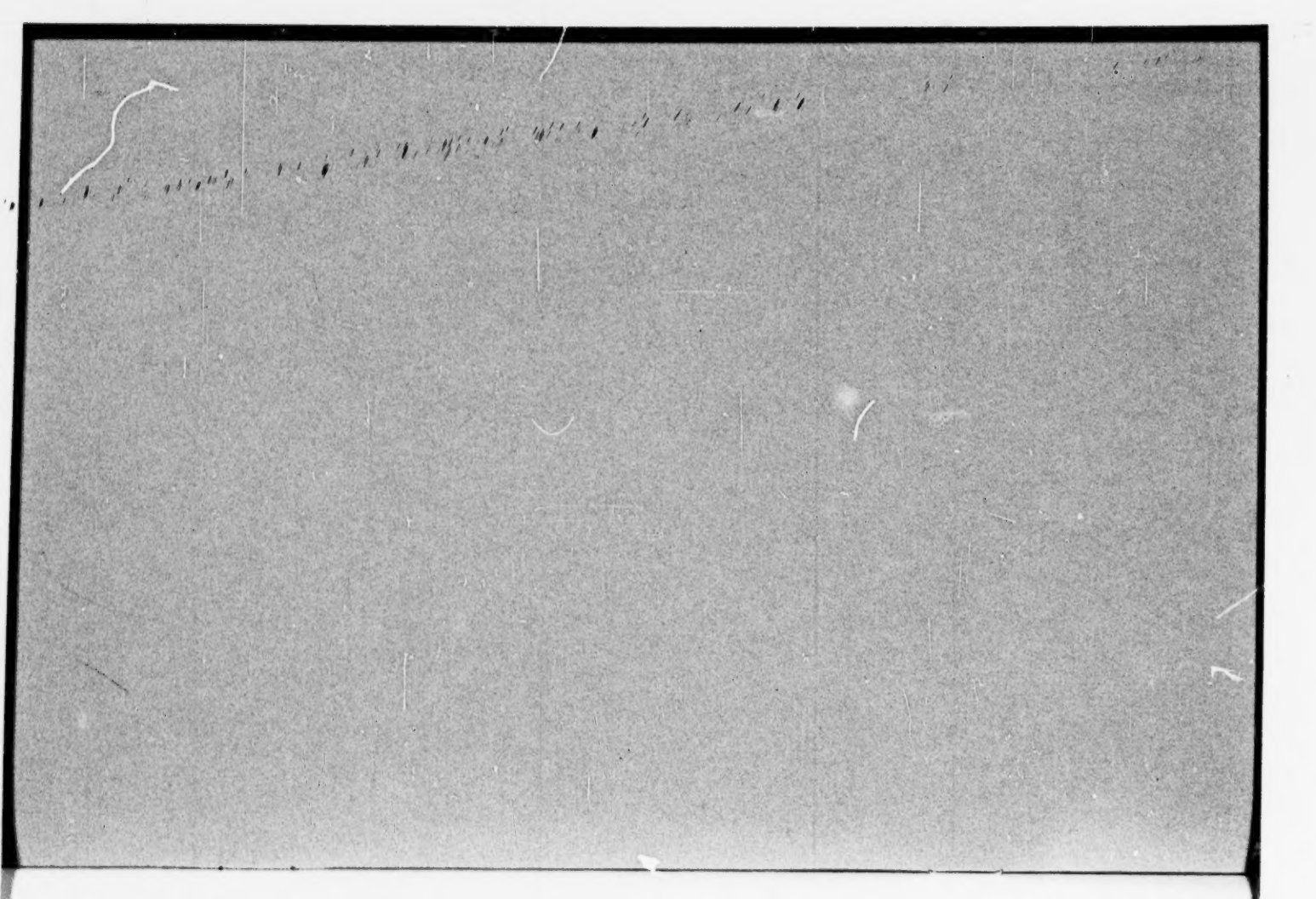

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REPLY MEMORANDUM FOR PETITIONERS

1. *The Trial Judge's Improper Conduct of the Trial.* The government wholly ignores the fair trial issue presented to this Court for purposes of determining whether the writ of certiorari should issue. Instead, it merely quotes at length from the lower court's opinion (U.S. Memorandum 3-7) to the effect that the trial judge's conduct did not "amount to denial of a fair trial" (Pet. App. A, at 16a). A mere perusal of petitioners' analysis of what occurred at trial (Pet. 7-16) should indicate that the appellate court's finding

that the trial judge's conduct of the proceedings did not deprive defendants of a fair trial creates a serious conflict with this Court's decision in *Offutt v. United States*, 348 U.S. 11 (1954), and the Seventh Circuit's decision in *United States v. Dellinger*, 472 F.2d 340 (1972), *cert. denied*, 410 U.S. 970 (1973), and is clearly inconsistent with accepted standards relating to the function of the trial judge (*see* Pet. 22-27).

2. *The Insufficiency of the Obstruction of Justice Count.* The government urges this Court not to consider the claim that Count 19, the obstruction of justice count, was constitutionally defective because the count did not specify the alleged conduct violating the statute and thus failed to contain assurance that petitioners Leon and Ethel Weiss were tried on charges deliberated upon by the Grand Jury. The reason offered is that "[t]his contention was raised for the first time in the court of appeals; since the objection to the indictment was not timely raised it should not be considered by this Court" (U.S. Memorandum 7).

Contrary to the government's statement, the motion to dismiss Count 19 was presented at the outset of the trial, at the conclusion of the government's case, as well as at the end of the case (2 J.A. 5-6, 63-67; 3 J.A. 222-28, 317, 321). On each of those occasions, the point was made that Count 19 was deficient in that it did not allege any affirmative conduct of the defendants which could constitute a violation of 18 U.S.C. §1503, and that the facts which were alleged – the failure to produce subpoenaed documents – did not constitute an obstruction of justice.

This essential fact fully distinguishes *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966), and *United States v. Fistel*, 460

F.2d 157 (2d Cir. [illegible]), on which the government relies (U.S. Memorandum 7-8). In *Thompson*, the point at issue – a technical pleading one – was first presented only after the trial was over by a motion in arrest of judgment. In *Fistel*, the technical pleading claim was presented initially on appeal, rather than at trial. *Fistel* makes plain that, had a timely motion to dismiss been made, as occurred here, the district court would have been required to dismiss (*see* 460 F.2d at 160-161).*

The government also argues that, since petitioners did not seek details of their conduct in a bill of particulars to amplify the charges against them, "they knew what conduct was being charged by the grand jury" (U.S. Memorandum 9). This contention misconceives petitioners' point. The constitutional defect alleged is that Count 19 failed to provide required guidance to the prosecutor, the court and the trial jury of those charges of conduct of the petitioners which the grand jurors deliberated upon and found adequate for indictment. *See Russell v. United States*, 369 U.S. 749 (1962). What the petitioners allegedly "knew" of their conduct is entirely irrelevant and not responsive to petitioners' point.

3. *The Improper Joinder of Defendants.* As a ground to support the decision below, the government urges that the joinder in the indictment of petitioner Ethel Weiss with the other defendants was proper under Rule 8(b), Fed. R. Crim. P. (U.S. Memorandum 11). The Court of Appeals,

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* The issue presented here and also urged below is *at the most* another reason, based on the same record, for the same result urged below: dismissal of Count 19. This circumstance does not constitute the improper raising of a new issue on appeal. *See Dewey v. Des Moines*, 173 U.S. 193, 197 (1899); *Chase Nat'l Bank v. United States*, 116 F.2d 625, 627-28 (2d Cir. 1940).

however, chose not to decide the case on this ground – describing it as "this difficult question" – and preferred, instead, to assume *arguendo* the contrary so that the issue could then be determined on the basis of lack of prejudice from the misjoinder (Pet. App. A, at 13a).

The government's position here and the authorities it cites (U.S. Memorandum 11) further confirm the widespread confusion as to the proper implementation of Rule 8(b). In *United States v. Gullia*, 304 F. Supp. 30 (W.D. Pa. 1969), the court read Rule 8(a) as authorizing the challenged joinder of defendants – a conclusion at variance with the express language of the rule and the holdings of the Second Circuit that Rule 8(a) governs joinder of offenses against the same defendant and not the joinder of different defendants. The other authority cited by the government, *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971), was the case of a defendant unlike Mrs. Weiss, who had been physically present and involved in all the transactions in the indictment which formed the basis of the charges against the other defendant. The government's reliance on these authorities underscores the need for an authoritative ruling by this Court on the questions raised by petitioner Ethel Weiss.

4. *The Denial of the Corporate Defendants' Constitutional Right to the Assistance of Counsel.* In response to the corporate petitioners' claim that they were denied their constitutional right to the assistance of counsel (Pet. 35-38), the government suggests that "Mr. Hack's abstention from participation in most of the trial may well have been the result of defense strategy" (U.S. Memorandum 12).

Nothing that the lower court said, nothing that the prosecutor said – in short, nothing in the record – supports the government's rank speculation. On the contrary, Mr.

Hack's actions were consistent with his position (*see* Pet. 8) that, because of his complete incompetence in criminal and trial matters (*see* 1 J.A. 104), he would do more harm than good for his clients by participating in the trial (2 J.A. 2-3). Indeed, the Court of Appeals' finding that Hack lacked "qualifications to represent the corporate defendants at trial" and that "[t]he conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified" (Pet. App. A, at 17a; *see* Pet. 15-16) amply explain Hack's conduct.

5. *The Impropriety of a New Jurisdictional Hearing.* The government's argument that the remand for a new hearing to determine whether the trial court had *in personam* jurisdiction over the corporate petitioners was "entirely proper" because the lower court had refused the government's "request for a hearing" and had therefore "deprived the government of the opportunity to prove jurisdiction" (U.S. Memorandum 12) perpetuates a gross error committed by the lower court (Pet. App. A, at 19a).

The fact is that a hearing had been held – on March 16, 1971 (*see* 1 J.A. 91-103). In that hearing, affidavits and memoranda of law were filed (1 J.A. 26-30, 89-90; *see* 1 J.A. 6). The government further filed numerous documentary exhibits (1 J.A. 31-88). Oral argument was also presented (*see* 1 J.A. 91-103).

At that hearing, "[t]he burden was upon the government to establish current jurisdictional facts" to prove that the "corporations were subject to the [trial] court's jurisdiction at the time of filing of the indictment" (Pet. App A, at 19a). Yet, the government voluntarily chose to meet its burden of proof by offering corporate

documents which ultimately failed to support the government's jurisdictional claim.

Having had the opportunity to establish jurisdiction, but having failed to meet its burden of proof, the government should not now be given a second opportunity to attempt to establish a basis for the trial court's jurisdiction in a new hearing.

Thus, in remanding the case, the Second Circuit clearly came into conflict with the Ninth Circuit's ruling in *Danziger v. United States*, 161 F.2d 299, *cert. denied*, 332 U.S. 769 (1947). Whether or not the government in *Danziger* offered to present evidence on the jurisdictional question (*see* U.S. Memorandum 12 n. 4), the fact is that the government there, just as here, had the burden of proof, which it failed to uphold. Having so failed, it could not expect to be accorded a new hearing.

For the foregoing reasons, and for the reasons set forth in the Petition, petitioners request that a writ of certiorari issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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